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THE LAW  
OF  
PRIVATE ARRANGEMENTS  
BETWEEN  
DEBTORS AND CREDITORS.

WITH  
PRECEDENTS OF ASSIGNMENTS AND COMPOSITION  
DEEDS.

BY  
REGINALD WINSLOW, M.A., LL.B.,  
OF CAIUS COLL. CAM., AND LINCOLN'S INN, BARRISTER-AT-LAW.  
(EQUITY SCHOLAR, LINCOLN'S INN, 1882.)

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## PREFACE.

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THE vast increase in the number of private arrangements which (as is almost universally admitted) has taken place since the Bankruptcy Act, 1883, came into operation, and the long interval that has elapsed since any text-book has appeared on the subject, lead to the conclusion that a treatise on this branch of the law may prove not unacceptable to the profession and to those who are engaged in the conduct of such arrangements. In the following pages I have made an attempt to supply the want which I believe to exist.

I have thought it better, at the expense of some repetition, to recapitulate in Chapter XIV. the results of some of the previous chapters, in order that trustees may find presented in as small a compass as possible the information necessary for their guidance.

No pains have been spared to render the Table of Cases as complete as possible. In citing works which have passed through more than one edition, I have adopted the German method of distinguishing the edition to which reference is made by a small index figure: *eg.* 1 Sm. L. C.<sup>s</sup> 357; 2 L. C. Eq.<sup>4</sup> 1004, which denote, respectively, the first volume of Smith's Leading Cases, 8th edition, p. 357, and the second volume of White and Tudor's Leading Cases in Equity, 4th edition, p. 1004.



In conclusion I wish to acknowledge my indebtedness in various parts of my task to the following works: Forsyth on Composition, Lewin on Trusts, De Collyar on Guarantee, and De Gex and Smith's Deeds of Arrangement.

In revising and correcting the proofs of the Precedents I have received much assistance from Mr. C. F. Brickdale, of Lincoln's Inn, Barrister-at-Law.

3 NEW SQUARE, LINCOLN'S INN,  
*March, 1885.*

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Wild v. Banning . . . . .	.. ..	2 Eq. 577	35 L. J. Chy. 594	.. ..	12 Jur. (N.S.) 464; 14 L. T. (N.S.) 845.

Wilding v. Richards.	108	1 Coll. C. C. 661	14 L. J. Chy. 211	.. ..	.. ..
Wilkinson v. Lindo .	43, 44	7 M. & W. 81	.. ..	.. ..	.. ..
Williams v. Mostyn .	31	.. ..	33 L. J. Chy. 54	12 W. R. 69	9 L. T. (N.S.) 476.
—— v. Walsby .	45	4 Esp. 220	.. ..	.. ..	.. ..
Wilson, <i>Es parte</i> .	134	11 Ves. 410	.. ..	.. ..	.. ..
—— v. Day .	190	2 Burr. 827	.. ..	.. ..	.. ..
—— v. Lloyd .	187	16 Eq. 60	42 L. J. Chy. 559	21 W. R. 507	28 L. T. (N.S.) 331.
—— v. {Ray .	161	10 A. & E. 82	8 L. J. Q. B. 224	.. ..	2 P. & D. 253.
—— v. {Wray .	153	1 Eq. 139	35 L. J. Chy. 276	14 W. R. 47	11 Jur. (N.S.) 905; 13 L. T. (N.S.) 318.
Wood v. Barker .	109	7 Q. B. 892	.. ..	.. ..	9 Jur. 796.
—— v. Dixie .	15	2 Stark. 417	.. ..	.. ..	.. ..
—— v. Roberts .	193	W. N. 1866, p. 207	.. ..	.. ..	.. ..
Woods v. Axton .	187	8 Ves. 4	.. ..	.. ..	.. ..
Worrall v. Harford .	..	.. ..	.. ..	.. ..	.. ..





# PRIVATE ARRANGEMENTS

BETWEEN

DEBTORS AND CREDITORS.



## CHAPTER I.

ARRANGEMENTS BETWEEN DEBTORS AND CREDITORS GENERALLY, AND THE CONSIDERATION NECESSARY TO SUPPORT THEM.

ARRANGEMENTS between debtors and their creditors may be roughly divided into three classes, namely:—*First*, Composition Agreements, strictly so called, by which the creditors agree to abandon their claims, in consideration of receiving a composition on their debts (i.e. a smaller sum bearing an agreed proportion to the amount of their respective debts),—or (as is sometimes provided) in consideration of receiving a negotiable security for such composition; there being an express or implied stipulation that the creditors shall not sue the debtor until he makes default in the performance of his part of the agreement. *Secondly*, Agreements, by which the debtor assigns the whole of his property to a trustee, for sale, and rateable distribution of the proceeds among his creditors, and the creditors, in consideration of such assignment, release their original

Classes of arrangements with creditors.

I. Composition agreements.

II. Assignments for creditors.

III. Agreements not to sue for limited time.

claims and accept the dividend payable under the agreement in discharge of their debts. *Thirdly*, Arrangements, under which the creditors (while not necessarily abandoning any portion of their debt or agreeing to accept anything less than payment in full), in order to enable the debtor to retrieve his position, agree to forbear from suing him for a limited time—such simple agreement for forbearance being usually called a *letter of licence*.

Inspectorship agreements.

Whether the arrangement contemplated be the acceptance of a composition, or an agreement for a *cessio bonorum*, or merely that the creditors shall forbear for a time from suing, it is often desirable to incorporate in it a provision for the carrying on or the winding-up of the debtor's business under the advice and supervision of the creditors, or a committee appointed by them; and by this means, in the case of a composition, the creditors' interests are protected during the time that must elapse before it is seen whether the debtor will be able to carry out the composition arrangement, and where the intention is to dispose of the debtor's business as a going concern, the creditors are enabled, without undue risk, to permit the debtor to carry on the business until a favourable opportunity occurs for realising it. Where the agreement is merely for the forbearance of the creditors, it is very necessary that they should have every facility for watching the debtor's position and preventing their being prejudiced by any misconduct on his part; accordingly, power is usually inserted to enable the inspectors to determine the arrangement at their discretion. A deed, containing provisions of this nature, for enabling the creditors to supervise the management of the business, is usually called an *inspectorship deed*.

These different modes of dealing with the debtor

have their several advantages. The advantages of an agreement for the acceptance of a composition were well stated by Lord Campbell in *Tetley v. Taylor* (a) "We know that composition deeds are very common in practice, and are frequently very advantageous both for the creditors and the debtor. The composition offered may be considerably more than would be the dividend on an immediate sale and distribution of his effects; and he may be enabled to pay this composition from the assistance of friends and from being permitted to avail himself of his position in the commercial world, which would be utterly lost if he were made a bankrupt."

Advantages of each.  
Ld. Campbell.

In some cases, where the creditors are not inclined to accept a composition, the debtor may be so unsubstantial or so untrustworthy, that nothing short of an immediate surrender of all his estate and effects will satisfy the creditors, but on the other hand, where the debtor is an honest man, with a good business suffering from temporary embarrassment, it will often be desired to "keep together the debtor's business in his name (which may be an important element in its value), and for his permanent benefit as well as for the temporary benefit of his creditors" (b), and in such case an agreement for forbearance, with provisions for the debtor's carrying on his business under inspection, may be most to the interest of all parties.

We shall now proceed to consider the law in relation to these arrangements, but, since the provisions of the several classes are frequently similar and their legal incidents alike, it will be impossible to treat them separately,

(a) 1 E. & B. 529.

(b) *Per* Willes, J., L. R. 1 Ex. 340.

though it is necessary at the outset thus to notice their distinguishing characteristics.

Difficulty  
in render-  
ing agree-  
ments  
binding.

*Cumber v.  
Wane.*

Acceptance  
of smaller  
sum cannot  
be satis-  
faction of  
larger.

The great obstacle that has beset arrangements with creditors, is the difficulty in rendering them binding on the creditors, owing to the Common Law rule that "a liquidated and undisputed money demand, of which the day of payment is past (not founded upon a bill of exchange or promissory note), cannot, *even with the consent of the creditor*, be discharged by mere payment by the debtor of a smaller amount in money, in the same manner as he was bound to pay the whole" (a). Accordingly, an agreement not under seal between a single creditor and his debtor, that the former shall accept in discharge of a larger liquidated demand a smaller sum, payable at or after the time when the debtor is bound to pay the larger, and in the same manner, is void (*nudum pactum*) for want of consideration. This proposition was laid down in *Pinnel's Case* (b) and followed in *Cumber v. Wane* (c), where it was held, that the performance of an agreement to pay £5 could not be a satisfaction of a debt of £15.

The hardship resulting from the decision in *Cumber v. Wane* (d) (which laid down a broader rule than the one stated above) made the judges avail themselves of every opportunity of distinguishing that case. It has thus been frequently commented on, and numerous exceptions have been engrafted on the doctrines laid down in it (e). In

(a) *Cumber v. Wane*, 1 Sm. L. C.<sup>2</sup> 357, 369; *cf. Heathcote v. Crookshank*, 2 T. R. 24; *Fitch v. Sutton*, 5 East, 229.

(b) 5 Rep. 117a.

(c) 1 Sm. L. C.<sup>2</sup> 357; and see *Lynn v. Bruce*, 2 Hy. Bl. 317.

(d) *U. s.*

(e) *E.g.*, that the giving of a *negotiable instrument* for a less sum may be a good satisfaction of a larger—the negotiability of the instrument being the consideration which supports the agreement (*Sibree*

spite, however, of all such exceptions the proposition above stated is still law, and was adopted very recently by the House of Lords in *Foakes v. Beer* (a). There, it was held, that a parol agreement between a judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to his creditor or his nominee the residue by instalments, the creditor will not take any proceedings on the judgment, is *nudum pactum*, being without consideration, and does not prevent the creditor, after payment of the whole debt and costs, from proceeding to enforce payment of the interest upon the judgment.

*Foakes v.  
Beer.*

The most important, perhaps, of all the exceptions that have been grafted on the doctrine of *Cumber v. Wane*, and the only one which concerns our present purpose, is that which relates to agreements with creditors generally. It is now well settled by a long series of cases, that an agreement between a debtor and his creditors generally, that the latter shall accept a less sum in satisfaction of a larger demand, is binding, the consideration to each creditor being the forbearance of the others.

Exception to rule in *Cumber v. Wane* in case of agreement with creditors generally. Consideration to each creditor being forbearance of the rest.

A forcible exposition of the Common Law doctrine and this exception thereto is to be found in the judgment of the late Master of the Rolls in *Couldery v. Bartrum* (b).

“According to English Common Law a creditor might accept anything in satisfaction of the debt except a less amount of money. He might take a horse, or a canary, or a tomcat if he chose, and that was accord and satisfaction :

Jessel, M.R.

*v. Tripp*, 15 M. & W. 23); in fact any benefit resulting to the creditor has been laid hold of as a consideration to render the agreement binding. See notes to *Cumber v. Wane*, 1 Sm. L. C.<sup>2</sup> 357.

(a) 9 App. Cas. 605, affirming the decision of the Court of Appeal, 11 Q. B. Div. 221.

(b) 19 Ch. D. 394, 399.

Jessel, M.R. but, by a most extraordinary peculiarity of the English Common Law, he could not take 19s. 6d. in the pound; that was *nudum pactum*. Therefore, although the creditor might take a canary, yet, if the debtor did not give him a canary together with his 19s. 6d., there was no accord and satisfaction. That was one of the mysteries of English Common Law.

“But, that being so, there came a class of arrangements between creditors and debtors, by which a debtor who was unable to pay in full offered a composition of something less in the pound. Well, it was felt a very absurd thing that the creditors could not bind themselves to take less than the amount of their debts. There might be friends of the debtor who would come forward and pay something towards the debts; or it might be that the debtor was in such a position, that if the creditors took less than their debts, he would have something over for himself and would exert himself to pay the dividend; whereas, if the creditors did not, they would get nothing, or less than nothing, if they incurred costs in endeavouring to get payment. Therefore it was necessary to bind the creditors; and, as every debtor had not a stock of canary-birds or tomtits, or rubbish of that kind, to add to his dividend, it was felt desirable to bind the creditors in a sensible way by saying that, if they all agreed, there should be a consideration imported from the agreement constituting an addition to the dividend, so as to make the agreement no longer *nudum pactum*, but an agreement made for valuable consideration; then there would be satisfaction. Consequently, if the creditors came in and all agreed *inter se* to take 10s. in the pound, the agreement *inter se* supplied the additional consideration which was supposed to be necessary, and the debts were satisfied.”

This exception was of gradual growth. There were from time to time decisions to the effect, that creditors, by acquiescing in the assignment by the debtor of his property for the benefit of his creditors, precluded themselves from suing for their whole demand (a), and that the introduction of a surety for the payment of a portion of the composition, imported sufficient consideration to render the agreement by the creditors to accept a composition binding on them (b); and it was held at *nisi prius* by Lord Ellenborough that an agreement between a debtor and his creditors that the latter should give him time, and receive payment by instalments, was binding, the consideration to each creditor being the forbearance of the others (c); but it does not seem to have been definitely established, by any considered judgment, that the mutual forbearance of the creditors (apart from the creation of a fund or the introduction of a third party as guarantor) was in itself a sufficient consideration to support the agreement by the creditors to release a portion of their debts, or to forbear from suing on them, until the case of *Good v. Cheesman* (d). The facts of that case were as follows: The plaintiff and three other creditors of the defendant met together on the 31st October, 1829, in consequence of a communication from the defendant, and signed an agreement (which was assented to but not signed by the defendant) to accept payment by the defendant's *covenanting and agreeing to pay* one-third of his annual income to a trustee of their nomination, and

Growth of  
exception.

*Good v.*  
*Cheesman*

(a) *Butler v. Rhodes*, 1 Esp. 236; cf. *Brady v. Sheil*, 1 Camp. 146; *Cork v. Saunders*, 1 B. & A. 46. Cf. *per* Tindal, C.J., in *Tatlock v. Smith*, 6 Bing. 339.

(b) *Steinman v. Magnus*, 11 East, 390.

(c) *Boothby v. Sowden*, 3 Camp. 175.

(d) 2 Barn. & Ad. 328.



executing a warrant of attorney as a collateral security until payment thereof. The defendant had other creditors besides the four above mentioned, particularly one G., and it was agreed at the meeting of the 31st October, 1829, that if G. would come into the agreement then made the defendant should set apart an additional sum of £20 *per annum* out of his income. G. never acceded to the agreement, nor was any trustee nominated, covenant entered into, or warrant of attorney executed. The plaintiff sued on his original claim. The question left to the jury was, whether the agreement entered into by the four creditors was conditional only, depending on G.'s assent, or absolute—if absolute the jury were directed to find for the defendant, which they did. A rule *nisi* having been obtained to enter a verdict for the plaintiff, it was on argument discharged, the Court holding that the agreement, although by parol, so as to be incapable of operating as a release, and although unexecuted, so as not to amount in strictness to a satisfaction, was a good answer to an action by the creditor for his original debt, as it constituted a new valid contract between the creditors and the debtor, and that for such contract there was good consideration to each creditor, namely, the undertaking by the other creditors not to press their individual claims (a).

Agreement  
with a few  
out of more  
creditors  
binding on  
those few.

The next point that had to be determined was, whether the mutual forbearance of *a few*, out of a larger number of creditors, was a sufficient consideration to render a composition agreement binding upon those few, or whether it was essential that there should be an agreement for the forbearance of *all* the creditors. It will be observed

(a) See *per Williams, J., Boyd v. Hind*, 3 Jur. N.S. 566.

that in *Good v. Cheesman* (in which case, however, the particular point was not discussed) the agreement was only between four of the creditors, though there were others, and the Court held that those who were parties to the agreement were bound by it. A contrary view, however, was taken in *Reay v. Richardson* (a), but the dicta of Lord Abinger in that case must be regarded as overruled by the decision in *Norman v. Thompson* (b), where the point arose directly. In this last case a proposal for a composition made by the defendant to his creditors was accepted by the plaintiff and some others, *but not by all*. The plaintiff sued on his original debt, but the defendant successfully relied on the agreement. Parke, B., in giving judgment, said, "An agreement by *two* or more of the creditors, to enter into a composition, is perfectly good and binding as to those parties, whether the others do so or not. An agreement must be founded upon a good consideration; and in such case, the agreement by each individual to give up part of his claim is a sufficient consideration."

*Norman v.  
Thompson*

This last case brings us to the close of our inquiry into the consideration necessary to support a parol agreement to accept a composition, and the law at the present time may be shortly stated to be "that if two only out of more creditors agree *inter se* to accept a composition the forbearance of one will be a sufficient consideration to make the agreement binding on the other." It must, of course, remain a question of fact in each case, "what was in contemplation by the parties to the agreement?" i.e. did they intend it to be absolute and binding on them in any

Question  
of fact  
whether  
agreement  
was to be  
absolute  
or con-  
ditional.

(a) 2 C. M. & R. 422.

(b) 4 Exch. 755 (*coram* Pollock, C.B., Parke, Alderson and Platt, BB.), and *cf.* *Carey v. Barrett*, 4 C. P. D. 379.

event, or was it to be conditional on all or a certain proportion of the creditors acceding to it? In every case, however, it is desirable that the intention of the parties should appear on the face of the agreement (*a*).

Debts by  
specialty.

For the purposes of creditors' agreements a debt by specialty may be regarded as being on the same footing as a simple contract debt. Although formerly, at law, nothing short of a release under seal could discharge an obligation under seal (*b*), yet in equity a creditor by specialty, who purported to come in on the same terms as other creditors, would be restrained from proceeding at law (*c*), and now under the Judicature Act (*d*) this equity would be enforced in all branches of the Court.

Summary  
of results  
of inquiry.

In all cases, however, it would be advisable that the agreement should be under seal, but where the agreement is not by deed, the preceding authorities serve to show that:

A parol agreement for the acceptance by creditors of a less sum in discharge of a larger demand may be binding on a creditor who concurs therein, although—

- (*a*) no trust fund is thereby provided for the benefit of creditors; and
- (*β*) there is no guarantee by a third party; and
- (*γ*) only two creditors concur.

(*a*) See *per* Bayley, J., in *Lewis v. Jones*, 4 B. & C. 506, 512. See *infra*, p. 75.

(*b*) *Lowe v. Eginton*, 7 Price, 604.

(*c*) *Mackenzie v. Mackenzie*, 16 Ves. 372.

(*d*) 36 & 37 Vict. c. 66, s. 25 (11).

## CHAPTER II.

WHAT AMOUNTS TO AN ACCESSION SO AS TO ENTITLE A CREDITOR TO THE BENEFIT OF THE ARRANGEMENT AND SUBJECT HIM TO ITS OBLIGATIONS.

It is in many cases a question of some nicety, to decide whether a creditor has rendered himself bound by the provisions of a creditors' agreement, and entitled to the benefit thereof.

It may be taken as a universal rule, that no persons are bound by a creditors' agreement, unless they are entitled to share the benefits secured thereunder, and, conversely, that no one can claim to partake of the benefit of the arrangement, unless he submits to its burthen (a).

Benefit and burden of agreement co-extensive.

There is, however, this difference between the case where the benefit of the agreement is sought by a creditor and where it is sought by the debtor, namely, that, where a creditor has remained strictly passive and has done nothing to render himself bound by the agreement—so that the debtor could *not* enforce it against him—yet, if he has not acted contrary to its provisions, he may afterwards successfully claim to be admitted to its benefit, unless events have occurred which prevent the admission of any fresh creditors—e.g. the death or

(a) *Per* Lord Cranworth, *Forbes v. Limond*, 4 De G. M. & G. 298.

bankruptcy of the debtor (a). Where, on the other hand, such events have happened as prevent the admission of any fresh creditors to the benefit of the agreement, and it becomes necessary for any creditor, who claims to share its benefit, to show that he had acceded to the agreement prior to the occurrence of such events, then the test is, whether he had acceded in such a way as to bind himself, if the debtor had sought to enforce the agreement against him, for "no person can be considered to have impliedly acceded to a deed of this sort within the true meaning of that expression who has not put himself in precisely the same situation with regard to the debtors as if he had executed it" (b).

*Forbes v.*  
*Limond.*  
Conduct  
not  
amounting  
to acces-  
sion.

In *Forbes v. Limond* (c), the case in which this proposition was laid down, the plaintiffs were indorsees of two bills of exchange drawn by a partnership at Calcutta. By an inspectorship deed for winding up the affairs of the partnership, it was provided that four of the partners should collect the assets, and pay them to the inspector, for distribution among the several creditors who should have become parties to, and have executed, or otherwise acceded to the terms of the deed. The plaintiffs sent their bills to their agents at Calcutta, who forwarded them "to the trustees" of the partnership to be registered. The receipt of the bills was acknowledged by a letter, signed in the partnership name "in liquidation," stating, "we have registered the claim you make on our estate," and returning the bills, which were sent back to the plaintiffs in London. Ten months later the inspector advertised a dividend of £10 per cent., which was shortly

(a) See *post*, p. 23 *seq.*

(b) *Per* Lord Cranworth, *Forbes v. Limond*, 4 De G. M. & G. 298.

(c) *U. s.*

afterwards paid to several creditors who had executed the deed. A month later four members of the partnership were adjudicated insolvent in India, and the inspector handed over the balance in his hands to their official assignee. The plaintiffs had received dividends on the bills under this insolvency and from other parties liable on the bills, and instituted this suit against the inspector to obtain from him the benefit of the £10 per cent. dividend advertised by him, but the bill was dismissed both by the Vice-Chancellor and on appeal, it being held, that, as the plaintiffs had done nothing which would have prevented their suing on their original claim, if they had found a solvent member of the partnership, they could not be said to have acceded to the composition agreement.

There are some cases which present an apparent exception to the rule, but which may perhaps be more correctly regarded as illustrations of it, the ground of the decisions being that the debtor *has* had the benefit of the creditor's forbearance, and the latter ought therefore to share in the provision for the benefit of the creditors. Thus, though it might be difficult to establish that a creditor who has had notice of an assignment for the benefit of creditors, but has remained passive, has thereby acquiesced in the assignment, so as to be precluded from suing on his original claim; yet it has been held that where a creditor with notice of the deed had remained passive so long as to lose his legal remedy, there was a strong presumption of his having acceded to the arrangement. Therefore where a creditor, who had notice of the trust deed, abstained from suing for fifteen years, and at the expiration of that time was allowed to execute the deed subject to any question as to the validity of his execution, the Court admitted him to the benefit of the

Apparent exceptions where debtor has had benefit of deed.

Creditor who has lost his legal remedy allowed benefit of deed.

*Nicholson v. Tutin.*

deed, holding that his standing by so long as to lose his legal remedy was a strong circumstance to show that he had acquiesced in the arrangement (a).

*Re Baber.*

So, where the debtor executed an assignment for the benefit of his creditors in consideration of their covenanting not to take proceedings against him for three years, with a proviso that creditors not executing within six months should be excluded, a creditor who had never executed the deed, but had acquiesced in it by not suing, was declared entitled to its benefits (b).

Subject, however, to these observations, the general rule holds good, that no creditor is entitled to the benefit of the agreement who is not bound by its provisions, so that the decisions, as to what constitutes an accession so as to entitle a creditor to the benefit of a composition, will serve as guides to us in considering what conduct on a creditor's part will render him bound—and *vice versâ*.

Parol accession sufficient,

It has been already seen in the previous chapter that a parol agreement to accept a composition is binding (c), and it would seem that this is so although it is the intention of the parties to embody their agreement in a formal instrument (d). Therefore where a creditor has agreed to accept a composition, it is unnecessary that he should execute the deed embodying the arrangement, in order to be bound by it or to have the benefit of it. Thus Lord St. Leonards lays down the law as follows: "It is not absolutely necessary that the creditor should execute the deed; if he had assented to it, if he had acquiesced in it, or acted under its provisions, and com-

(a) *Nicholson v. Tutin*, 2 Kay & J. 18.

(b) *Re Baber*, 10 Eq. 554.

(c) *Good v. Cheesman*, 2 B. & Ad. 328, *ante*, p. 7.

(d) *Cf. Crossley v. Maycock*, 18 Eq. 180; but see *contra*, *per* Pollock, C.B., *Boyd v. Hind*, 25 L. J. Ex. 246.

plied with its terms, and the other side expressed no dissatisfaction, the settled law of the Court is, that he is entitled to its benefits. The mere fact of his signature is not required" (a). The same rule holds good, though the agreement be expressed to be for the benefit of such creditors only as seal and deliver the deed, the Court holding it unnecessary for a creditor to execute, provided he assent to the arrangement (b). even where deed requires creditor to execute,

So, even where the deed has contained a proviso that it shall be *void* if not executed by certain creditors, in spite of this proviso, if they accept the composition, or otherwise accede to the arrangement, the deed is held valid (c). "It is the constant course in Equity, that if creditors act under such a deed, and thereby treat it as valid, although they have not executed it, a Court of Equity will also act under it, and treat it as valid whether such creditors have signed it or not" (d). and even where there is a proviso avoiding the deed if creditors do not execute.

A creditor, therefore, who has verbally agreed with the other creditors to accept a composition, cannot by a subsequent refusal to execute the deed relieve himself of his prior agreement (e), for since he has held himself out to other creditors as assenting, it would be a fraud on such other creditors if he were allowed to withdraw (f); but where there has been no prior arrangement, and a creditor signs, what purports to be an agreement between

(a) *Field v. Lord Donoughmore*, 1 Dr. & War. 228, and *cf. Biron v. Mount*, 24 Beav. 649.

(b) *Per Wood, V.C., Raworth v. Parker*, 2 K. & J. 169.

(c) *Jolly v. Wallis*, 3 Esp. 228.

(d) *Per Lord Eldon, Spottiswoode v. Stockdale*, G. Coop. 105.

(e) *Bradley v. Gregory*, 2 Camp. 383; *Anstey v. Marden*, 1 Bos. & P. N. R. 124.

(f) *Wood v. Roberts*, 2 Stark. 417 (doubted by Lord Abinger, *Reay v. Richardson*, 2 C. M. & R. 422); *Butler v. Rhodes*, 1 Esp. 236; but see the remarks on these cases in *Boyd v. Hind*, 1 H. & N. 938.



*Boyd v.  
Hind.*

the *creditors signing it* for the acceptance of a composition in satisfaction of their debts, on the faith of a representation by another creditor that he will sign, it has been said that this would be no defence to an action by the latter against the debtor for his whole debt. Thus in *Boyd v. Hind* (a) the plaintiff was requested by the debtor's agent to sign a composition paper, which purported to be a memorandum by which each of the undersigned creditors, in consideration of the agreement therein contained on the part of the others, agreed with the others and also with the debtor to accept a composition of 10s. in the pound, and the plaintiff, after looking over the list of creditors, asked whether L. had signed, and being told that he had not, said he would not sign till L. had signed. The agent then procured L.'s signature, but the plaintiff refused to sign. The Court (Cockburn, C.J., Wightman, Williams, Crowder, Crompton, and Willes, JJ.) held there was no evidence that the plaintiff had induced L. to sign on the faith that the plaintiff would afterwards sign it, and it was intimated that, even if the plaintiff had induced L. to sign by such a representation, it would not have been any defence to the plaintiff's action at law, though it might have rendered him liable to an action for a breach of the promise (b).

Creditors  
estopped  
by acqui-  
escence in  
a *cessio  
bonorum* by  
the debtor.

It has been also decided in several cases that, where in pursuance of the arrangement the debtor denuded himself of everything, and assigned the whole of his property for the benefit of his creditors, creditors who acquiesced in such arrangement should not be allowed to withdraw, on the ground that their withdrawal would be a fraud on the debtor, who had thus deprived himself

(a) 1 H. & N. 938.

(b) As to representations see *post*, p. 71 *seq.*

all other means of payment on the understanding that they would come in under the arrangement (a).

A person who executes a creditors' deed may be held, contrary to his real intention, to have acceded to the arrangement as a *creditor*, and thereby released his debt. Thus if the trustee be a creditor and execute the deed, he will, unless it is apparent on the face of the deed that he only executed as trustee, be taken to have released his debt. This was the decision in *Teed v. Johnson* (b). In this case the plaintiffs, Teed and Bishop, having brought an action on a guarantee, the defendants pleaded a release of the principal debtor, Jessop, contained in an assignment for the benefit of Jessop's creditors made between Jessop of the first part, Bishop and another as trustees of the second part, and "the several persons whose names were undersigned" of the third part. The deed was executed by Bishop, but the schedule of names of creditors signing did not include his. The plaintiffs replied that Bishop was made a party in two capacities, as trustee and as creditor, but only executed as trustee, and did not sign in the schedule as creditor nor intend to release the debt. The Court (Alderson, Martin, and Bramwell, BB.) held this replication bad, and Martin, B., said: "This deed operates by express words to release every debt up to the day of the date; and by its true construction the parties who executed it released every debt due from the original debtor to them at the time of execution. *Even, therefore, though the plaintiffs signed as trustees the debt was barred*" (c).

Creditor held to have acceded contrary to his real intention.

*Teed v. Johnson.*

(a) *Butler v. Rhodes*, 1 Esp. 236; *Cork v. Saunders*, 1 B. & Ald. 46; *Tatlock v. Smith*, 6 Bing. 339.

(b) 11 Ex. 842.

(c) 25 L. J. Ex. 110, 113. For cases where creditors intending to accede only in respect of a particular debt have been held bound as to all their claims on the debtor, see *infra*, ch. vii., p. 85 *seq.*

## CHAPTER III.

## TIME FOR ACCESSION.

WE have already seen that, although the deed requires creditors to execute it in order to obtain the benefit thereof, it has been held unnecessary for them to do so (a). Our next subject for inquiry is, whether the *time* fixed by the deed for accession is of the essence of the contract.

Is time  
limited for  
accession of  
essence of  
contract?

Object of  
limiting  
time for  
accession.

It is not unusual, in assignments for the benefit of creditors, to insert a provision that it shall be for the benefit of such of the creditors as accede to its provisions within a given period—usually three months—the object being to hasten the arrangement and authorize the trustees, when that period has expired, to make a dividend which the subsequent claim of the other creditors shall not disturb (b).

The question consequently has often arisen, whether an accession after the period thus fixed will on the one hand bind a creditor so acceding, and on the other entitle him to the benefit of the provisions of the arrangement.

*Dunch v.  
Kent,*  
creditor  
admitted.

This point was first considered in *Dunch v. Kent* (c), which was a case of a creditor seeking the benefit of the agreement. The facts were as follows :—The King being

(a) *Ante*, p. 14 *seq.*

(b) *Per* Lord Campbell, *Whitmore v. Turquand*, 3 D. F. & J. 111.

(c) 1 Vern. 260.

indebted to Colville, a banker, and Lindsey, a bankrupt, having married Colville's widow and executrix, the King, in consideration of the debt, granted to Lindsey a perpetual annual sum charged on the excise, upon trust that all such of Colville's creditors as would come in within twelve months, and accept a share of this annual sum proportionable to their debts, should have the same assigned to them. The plaintiff (who was a creditor of Colville), long after the expiration of the year, filed a bill to have the benefit of the trust, and complained of Lindsey's assignment of the trust fund to some of his own creditors. The Court held (a) that, *though the plaintiff had not come in within the year*, he was entitled to the benefit of the trust.

A similar decision was given in *Spottiswoode v. Stockdale* (b), but there the non-execution within the limited time was due to the fraud of the debtor, and he could not be allowed to take advantage of his own wrong.

*Spottiswoode v. Stockdale.*

In *Collins v. Reece* (c), Knight Bruce, V.C., expressed a strong opinion (though it ultimately became unnecessary to decide the point) that the time limited for the execution of the deed is essential. "Suppose, upon the last day limited by the deed for execution, a creditor, finding that but few other creditors have signed or assented to the deed, signs it; is he to be prejudiced by all the other creditors who subsequently sign or assent?" (d)

This opinion was considered by Page Wood, V.C., in *Raworth v. Parker* (e). The facts there were as follows:—

*Raworth v. Parker, creditor admitted.*

(a) 1 Vern. p. 318.

(b) G. Coop. 102.

(c) 1 Coll. 675.

(d) But see *per* Lord Campbell in *Whitmore v. Turquand*, 3 De G. F. & J. 107 at p. 111; *infra*, p. 21.

(e) 2 K. & J. 163 at p. 170; and see also *Nicholson v. Tutin*, *ib.* p. 18.

A deed was executed by the plaintiff's father for the benefit of his creditors (of whom the plaintiff was one), by which it was provided that all creditors were to be excluded from the benefit of its provisions who did not execute or assent in writing thereto before the 22nd of July then next, or within such further time not exceeding thirty days as the trustees should by writing declare. The trustees advertised for creditors, stating that such creditors as should not execute the deed "on or before the 22nd of July, or such further time as the said trustees should declare," would be excluded. The plaintiff was in America at the date of the execution of the deed. On the 22nd of July, W., who had acted as solicitor for the plaintiff, wrote a letter to the trustees, saying that he assented to the deed on the part of the plaintiff. He was asked whether he had authority, and stated that he had no direct authority. Subsequently W. received a power of attorney to execute the deed, and, within the period to which the trustees had power to extend the time for execution, he applied to be allowed to execute the deed on the plaintiff's behalf. The trustees and other creditors refused to allow him to do so. Wood, V.C., after reviewing the previous decisions, held it was clearly the duty of the trustees to have enlarged the time to enable the plaintiff to come in, and declared the plaintiff entitled to the benefit of the deed.

*Gould v. Robertson*,  
creditor  
excluded.

In *Gould v. Robertson* (a) the debtor had assigned his property to trustees for the benefit of his creditors, with a proviso that in case any creditor should not come in under the deed for six months after its date, he should be peremptorily excluded from the benefit of it. A mortgagee of part of the property, whose solicitor corresponded

(a) 4 De G. & Sm. 509.

with the trustees on the subject of the mortgage, but who did not express any intention of coming in under the deed for five years afterwards (by which time the whole of the trust fund had been distributed), was held not entitled to come in under the deed (a).

The question was again argued before Wood, V.C., in *Whitmore v. Turquand* (b), where it was held by him, and on appeal by the Chancellor (Lord Campbell), that the plaintiffs, who had neither assented to nor dissented from the provisions of the deed (the benefits of which were in terms limited to creditors who should execute it within three months), might execute it after a lapse of five years, and be admitted to share in the benefit thereof with those who had executed within the prescribed time—there having been no dividend paid, and no rights or liabilities affected by the delay. Lord Campbell in giving judgment said: “The deed was not for the benefit of any particular class of his creditors, but for all equally. The period of three calendar months is evidently introduced with a view to hasten the arrangement, and to authorize the trustees, when that period has expired, to make a dividend which the subsequent claim of other creditors shall not disturb. This is the understanding which has long prevailed on the subject; and with this understanding the supposed hardship upon a creditor who executes the deed the last hour of the last day of the limited period does not exist; for if he thinks he is secure against any more creditors coming in afterwards, and feels confident that he must receive 20s. in the pound, and for this reason consents to execute the deed, he has a right only to blame himself for being ignorant

*Whitmore  
v. Tur-  
quand,  
creditor  
admitted.*

Lord  
Campbell.

(a) With regard to this case, see also *post*, p. 30.

(b) 1 J. & H. 444; on appeal, 3 D. F. & J. 107.

of the law which he ought to have known, as he ought to know the days of grace given for the payment of a bill of exchange."

Summary  
of result of  
preceding  
cases.

It would seem, therefore that, unless the deed requires the peremptory exclusion of all who do not accede within the time limited, the Court will not regard accession within such time as essential, and that even where the deed required peremptory exclusion of those not acceding within the time, the Court would relieve against accidental omissions to do so (a).

No time  
limited for  
accession.  
Creditors  
who delay  
not allowed  
to disturb  
dividends.  
*Broadbent  
v. Thornton.*

Where an assignment for the benefit of creditors, dated the 11th of June, 1847, did not limit any time for accession, and the plaintiff in July gave the trustees verbal notice of his claim (which was one that required investigation), but no particulars, and the trustees advertised the 11th of October as the last day for execution, it was held, on a bill filed by the plaintiff in April, 1848 (after the trustees had made a dividend), that the plaintiff might execute the deed and participate in future dividends, but could not be allowed to disturb those already made (b).

*Field v.  
Cook.*

In *Field v. Cook* (c) a creditors' deed had been executed in 1849, by which it was provided that no creditor should be entitled to receive any part of the estate until he should have proved his debt in the manner therein required. The plaintiff, a creditor who had executed the deed, insisted on an alleged settled account, and refused to verify his claim. In 1852 a dividend was declared, but the trustees delayed paying it until 1854, the plaintiff meanwhile insisting on his claim being a settled

(a) *Watson v. Knight*, 19 Beav. 369, 372.

(b) *Broadbent v. Thornton*, 4 De G. & Sm. 65.

(c) 23 Beav. 600.

account, and taking no step to determine the question. In 1856 the plaintiff instituted a suit for the execution of the trusts of the deed. There being no valid settled account, the Court held that the plaintiff was entitled to the benefit of the deed, only on the terms of not disturbing dividends already paid.

Although the Courts have allowed such latitude with regard to the period for accession beyond the time fixed by the deed, there are certain circumstances which have been held to determine that period, either with regard to all or particular creditors, which will now be considered.

Circumstances determining the period for accession.

### 1. *The Death of the Debtor.*

In *Lane v. Husband* (a), B, the debtor, in 1830 executed a deed whereby, in consideration of the licence and release thereafter contained, he assigned all his property to the defendants in trust for the creditors executing the deed. The deed contained a several covenant by the creditors not to sue the debtor, and a release. No time was limited within which creditors were to execute. The plaintiff received notice that the deed was lying ready for his execution, but did not execute—because (as he alleged) he was not in the neighbourhood, and there was no prospect of an early distribution of B's effects—but he took no measures in opposition to the deed. In 1833 B died, and the defendants obtained administration of his effects. According to the defendants, the first intimation they received of any claim, on the part of the plaintiff, to execute the deed, was in 1840, when they refused to allow him to do so. The plaintiff then filed his bill to

1. Death of debtor, *Lane v. Husband*.

(a) 14 Sim. 656; see *contra*, per Lord Plunkett in *Field v. Donoughmore*, 2 Dr. & Wal. p. 656.



obtain the benefit of the trusts, but it was dismissed, on the ground that the debtor could not have the benefit for which he bargained.

It will be observed, that here a very long period had been allowed to elapse after the death of the debtor, but would the same conclusion have been arrived at, had the claim been made immediately on the debtor's death? The debtor had so far had the benefit of the consideration for which he bargained, inasmuch as the plaintiff had not sued or taken any steps to enforce his demand, though he had not by standing by lost his remedy in the debtor's lifetime, and so brought himself within the principle of *Nicholson v. Tutin* (a). Whatever conclusion might be come to on this point, it is submitted (in spite of the dicta which lay down the proposition that the death of the debtor absolutely determines the period within which the creditors may come in) that where the debtor dies before the expiration of the time limited for the assents, the creditors would still have a right to come in within that time, and possibly the Court might allow others to come in afterwards, who, under special circumstances, were unable to do so within the period so limited.

2. Debtor's bank-  
ruptcy, &c. 2. *Where the Debtor has been made a Bankrupt, or has taken the benefit of an Act for the relief of insolvent debtors.*

Creditors who have not acceded to a deed prior to the bankruptcy of the debtor, cannot afterwards come in and claim the benefit of the provisions of such deed.

*Biron v.  
Mount.*

In *Biron v. Mount* (b), Watts, the debtor, in Feb. 1855,

(a) 2 Kay & J. 18, 23, *ante*, p. 13.

(b) 24 Beav. 642; 27 L. J. Chy. 191. Cf. *per* Page Wood, V.C., in *Whitmore v. Turquand*, 1 J. & H. 452; and *Forbes v. Limond*, 4 De G. M. & G. 298, *ante*, p. 12.

executed a deed, whereby he assigned to trustees all his real and personal estate upon trust for distribution among the creditors, parties thereto. The deed contained a power for Watts, with the consent of the trustees, "to insert in the schedule, thereunder written, the name of any creditor or creditors of Watts, whose name he, Watts, might think ought to be inserted therein, upon the terms of such creditor or creditors executing these presents;" and the person whose name was inserted was to be entitled to participate in all the advantages to be derived therefrom, *pari passu* with the other creditors of Watts, in the same manner and to the same extent as if he or they had been originally a party or parties thereto, so always that any dividend or distribution then made should not be disturbed. The deed also contained a letter of licence to Watts and covenants by the creditors not to sue, and to accept the dividend in full satisfaction. In December, 1855, Page, one of the creditors, sued Watts and obtained judgment, and on the 18th December, 1855, Watts wrote to all the creditors who had not executed the deed pressing them to do so. In February, 1856, Watts was arrested by Page, and on the 6th March, 1856, petitioned for relief under the Insolvent Debtors Act, and obtained his discharge. In April, 1856, the trustees paid a dividend of 2s. in the pound to the creditors who had executed the deed, but difficulties having arisen in the execution of the trusts, this suit was instituted by the plaintiff on behalf of himself and all other the creditors of Watts entitled to the benefit of the deed, to ascertain (*inter alia*) who were entitled to share in such benefit. Lord Romilly, M.R., in giving judgment, said (p. 650): "The only question is, up to what time are the creditors entitled to come in under the deed? I admit that so long as they have done no act inconsistent with the deed, and

Lord  
Romilly,  
M.R.

so long as the relation between the parties remains unchanged, they may come in under the deed; and accordingly, if there had been no insolvency, there would have been nothing to prevent these creditors coming in under this deed now. . . . The question here is, whether they are entitled to come in when the relation between the parties has become altered? It is obvious they could not come in after all the assets had been divided; for they could not disturb any proceedings that had taken place. . . . In point of fact, the deed is only a trust deed for the benefit of such persons as should come in under it and become liable to its provisions, and to the covenants entered into on the part of the persons executing it, and they must do that in order to constitute themselves *cestuis que trust*, and they do not become such until they are bound by the covenants contained in the deed. Then are they able to put themselves in that situation now? It is obvious they are not, for they cannot give Watts the benefit which he contracted for, because the insolvency has superseded it. The object of the deed was to prevent bankruptcy and insolvency, and all the creditors who have done what they could to prevent such a result, either by executing the deed or by acquiescing in it, are entitled to the benefit of it. But an insolvency having taken place, those creditors who have lain by till that event has occurred are not, in my opinion, entitled to the benefit of the deed." The circumstances here were particularly strong against the contention of the creditors seeking to be admitted after the insolvency, because on the construction of the deed it was held that it was the duty of the trustees to set aside dividends for persons who refused or neglected to execute the deed; and that such dividends were payable to the debtor. On his insolvency these divi-

dends, of course, passed to his assignee, and to have allowed the debtor to exercise his power of admitting creditors to the benefit of the deed subsequently to the insolvency, would have been to allow him to admit them to share in the benefits of a deed that affected, not his own property, but the property of his assignee.

### 3. *Refusal or relying on rights inconsistent with the deed.*

If the party claiming to come in "actively refuses to come in under or assent to the deed within the time limited, and does not retract the refusal within that time" (a), or relies on rights inconsistent with the deed, he will not afterwards be admitted to the benefit of the trusts.

3. Refusal or relying on rights inconsistent with the deed.

In *Bush v. Shipman* (b), the debtor, John Shippam, on the 8th of March, 1842, executed a deed of assignment of his property to the defendants for the benefit of his creditors, the trusts of the deed being to divide the surplus, after payment of expenses, among such of his creditors as should execute the deed, or signify, in writing, their assent to it within three months from the date, rateably and in proportion to their debts, and to pay the balance to the debtor. The deed concluded with a general release. *There was no reservation of the rights of secured creditors.* At the date of the execution of this deed the plaintiffs were entitled by custom, as unpaid vendors, to a lien on certain hops in their possession belonging to the debtor, for purchase money, &c. The debtor, on the 10th of March, informed

Realising securities, *Bush v. Shipman.*

(a) *Per Knight Bruce, V.C., in Johnson v. Kershaw*, 1 De G. & Sm. 264; *cf. Bush v. Shipman*, 14 Sim. 239; *Watson v. Knight*, 19 Beav. 369.

(b) *U. s.*

the plaintiffs of the execution of the deed, and advised them to take to the hops rather than come in with his other creditors. In April and May the plaintiffs were in correspondence with the defendants, and applied for, and ultimately obtained, their authority to sell the hops. Prior to December, 1842, the defendants paid the other creditors a dividend of 5s. in the pound. In January, 1843, the plaintiffs sold the hops for much less than the amount of their lien, and claimed to come in under the trust deed, and receive a dividend of 5s. in the pound on the balance of their debt. Shadwell, V.C., dismissed the bill, holding that the plaintiffs' action in realising their security was quite inconsistent with the spirit of the deed, which contemplated a rateable division among all the creditors—a decision which was affirmed by Lord Lyndhurst on appeal (a).

*Secus :*  
*Graham v.*  
*Ackroyd.*

But where, at the date of an inspectorship deed, a creditor had a claim on account of acceptances, which he had given to the debtor on goods shipped by the debtor through him as his factor on a *del credere* commission, which goods had not then been sold, and, at the date of the deed, the majority of the acceptances were undue; the creditor was held entitled to come in under the inspectorship deed for the ultimate balance after realising the goods (b). So in *Broadbent v. Barlow* (c), where the facts were as follows: The plaintiffs, who were cotton spinners, employed H., a commission agent, to sell their goods. H. fraudulently sent these goods with goods of his own to factors in India. H. afterwards executed an assignment

*Broadbent*  
*v. Barlow.*

(a) *Sub nom. Buck v. Shippam*, 1 Phill. 694, and see *Cullingworth v. Loyd*, 2 Beav. 385, *post*, p. 143.

(b) *Graham v. Ackroyd*, 10 Ha. 192, *post*, p. 89 *seq.*

(c) 3 D. F. & J. 570.

for the benefit of his creditors, in which the plaintiffs, who had not then discovered the fraud, acquiesced. On the discovery of the fraud the plaintiffs claimed a sum which appeared to be due to H. from the factors on general balance of account, and it was held that they were *entitled to this sum, and at the same time to have the benefit of the assignment for the balance of their claim.*

In *Watson v. Knight* (a), the debtor, in April, 1851, assigned his property to trustees in trust for such of his creditors as should execute the deed on or before the 2nd June then next, the deed providing that every creditor not executing by that date "should be excluded from all benefit thereunder, notwithstanding any rule at law or in equity to the contrary." The plaintiff, who had obtained a judgment against the debtor prior to the assignment, was informed of the execution of the deed, but did not execute within the time limited. In October, 1851, the lands comprised in the assignment were offered for sale by auction; the plaintiff's solicitor gave notice at the sale that the plaintiff had a claim on the estate for the amount of her judgment, and that the purchasers would take subject thereto. The estate was sold. Three days later the plaintiff applied to execute the deed, but was refused. She then filed a bill to be admitted to the benefit of the deed, but it was dismissed by Lord Romilly, M.R., who said, "I am of opinion that the plaintiff would not have been bound by the non-execution before the 2nd of June if it had occurred by accident, and she had come the next day and offered to execute it; but having allowed more than four months to elapse, and having set up a claim to the property adverse to the deed, I think she is precluded. If she had intended to come in under the deed, *she must*

*Watson v. Knight.*

Creditor excluded on ground of delay and adverse claim.

(a) 19 Beav. 369.

have released her claim under the judgment, and it was her duty to inform the trustees, without delay, that she intended to claim under the deed, and to release her judgment."

The decision in *Gould v. Robertson* (a) was explained by Page Wood, V.C., in *Nicholson v. Tutin* (b), as having been decided on the same ground, viz., that the creditor had relied on rights inconsistent with an accession to the deed.

*Brandling*  
*v. Plum-*  
*mer.*

Creditor  
relying on  
judgment.

In *Brandling v. Plummer* (c) creditors' deeds were executed in 1835 and 1836 for the benefit of such creditors as should execute the same within six months of the date thereof, those who failed to do so to be excluded unless the trustees should permit them afterwards to execute, in which case they were to be admitted to the benefit of the trusts as from the date of their execution. A judgment creditor who was aware of these deeds did not execute them, relying on his claim as paramount to them. After a lapse of twenty-two years it was discovered that the judgment was invalid, and the creditor petitioned the Court, in a suit that had been instituted for carrying into effect the trusts of the deeds, to be allowed to execute the deeds and participate in the benefits of the trusts, but Kindersley, V.C., refused the application, holding that there had been no such mistake or misapprehension as would constitute a sufficient equity.

Provision  
for pay-  
ment of  
debts of  
third  
person.—  
Time  
essential.

All the preceding cases with reference to the time of accession have been cases where the debtor has assigned *his own property* for the benefit of his creditors, and in

(a) 4 De G. & Sm. 509; see *sup.* p. 20.

(b) 2 K. & J. 22.

(c) 27 L. J. Chy. 188.

these (with the exceptions already considered) the Court has not regarded time of the essence of the contract, but has admitted all creditors who come in within a reasonable time. But the case is quite different where a person makes provision for the liquidation of debts, for the payment of which he is under no legal obligation. In such case the terms of the agreement must be strictly complied with; it is a voluntary contract, and there can be no equity for enlarging the burden so undertaken, unless on the ground of fraud (*a*).

(*a*) *Emmett v. Dewhurst*, 3 M. & G. 587; *Williams v. Mostyn*, 33 L. J. Chy. 54.



## CHAPTER IV.

## RESULT OF ACCESSION, AS AFFECTING A CREDITOR'S RIGHT OF ACTION ON HIS ORIGINAL CLAIM, AND OTHERWISE.

Composition arrangements as a bar to an action on the original debt.

WE have in a previous chapter considered what conduct on the part of a creditor will amount to an accession to a creditor's arrangement; in the present chapter we have to inquire how such accession affects the creditor's right of action for his original demand.

Former difficulties.

There were formerly considerable practical difficulties in pleading a creditor's arrangement, especially an agreement to accept a composition, in defence of an action brought by a creditor for his original debt, owing to the danger of misstating the exact legal effect of the agreement (e.g. by pleading the agreement as an accord and satisfaction while it was still executory); but it is apprehended that now no miscarriage of justice will be allowed to result from any error of this kind.

Creditor cannot sue whether he releases debt, covenants not to sue, or accepts satisfaction.

In most cases the terms of the agreement on the part of the creditors are express, and whether they purport to release their debts, or covenant never to sue for them (a), or agree to accept the provisions of the new agreement in satisfaction of their debts (b), they will be unable to maintain an action against the debtor on their original

(a) *Deux v. Jeffries*, Cro. Eliz. 352.

(b) *Good v. Cheesman*, 2 B. & Ad. 328.

demands until they have been remitted to their rights by the debtor's default (unless the agreement is not binding on them on some of the grounds to be considered in Chapter VI.); and where they have agreed to accept a composition in satisfaction or discharge of their debts, then upon payment their claims will be extinguished for ever, unless the agreement is avoided on the grounds of public policy referred to hereafter (a).

Where the creditors covenant not to sue at all, it operates as a release. Accordingly, where B, one of A's creditors, executed in May, 1850, a deed, whereby A assigned his property on trust for his creditors and B covenanted not to sue him, and that if he did the deed might be pleaded as a release, and B died soon after, having by his will, dated June, 1850, given a legacy to A, and directed that if any legatee should be found indebted to him in any sum, such sum should be taken as part of his legacy, and B's executors received only 7s. in the pound on the debt, it was held, that B's debt was released and his executors were not entitled to deduct from A's legacy the difference between the debt and the amount of the dividends (b).

Covenant  
not to sue  
operates as  
release.  
*Go'ds v.*  
*Greenfield.*

It is important to observe in every case what it is that the creditors accept in satisfaction of their debts. They may accept the mere *promises* or *trusts* of the new agreement in satisfaction of their claims, and the *agreement alone*, without performance, might then be a sufficient defence to an action brought by a creditor on his original demand (c). "At Common Law, where a body of credi-

Difference  
between  
cases where  
the agree-  
ment itself  
and where  
its per-  
formance  
is accepted  
in satis-  
faction.

(a) *Infra*, Ch. VI. p. 70 seq.

(b) *Golds v. Greenfield*, 2 Sm. & G. 476.

(c) *Good v. Cheesman*, u. s.; and *per cur.* in *Boyd v. Hind*, 1 H. & N. 947.

Mellish,  
L.J.

tors accept a composition, they may either agree to take the promises of the debtor, with or without a surety, in satisfaction of the debts, or they may agree that payment shall be a condition precedent, and that if the debtor pays the composition at a certain time and place, the creditors will accept that composition in satisfaction of their debts. It is a question of construction of the instrument of arrangement, and it is not uncommon for the creditors to accept a promise by the debtor and a surety as a satisfaction of their debts. But where they agree to accept a composition, the debtor is not discharged unless he pays the composition" (a). Or again, the agreement by the creditors may be that giving promissory notes, with or without sureties, shall be accepted in discharge of the existing debts, and then the execution of the promissory notes by the debtor and the sureties may be pleaded as accord and satisfaction (b).

Where  
performance  
of  
agreement  
to be  
accepted in  
satisfaction,  
can  
creditor  
sue in  
interval?

The case, however, where it is not the *agreement itself* but its *performance* (whether by giving securities for, or by payment of, the composition) that the creditors agree to accept in satisfaction, requires some further consideration. What is the respective position of the debtor and the creditors in the period that has to elapse before the time fixed for performance? In such a case the intention of the parties, whether tacit or expressed, is that the creditors shall forbear from suing until the time fixed for performance, but the debtor's original liability is not discharged until the agreement is fulfilled by actual payment or tender (c). The question, therefore, arises whether, so long as this liability subsists, such agreement

(a) *Per Mellish, L.J., in Re Hatton, 7 Chy. 726.*

(b) *Per James, L.J., ib. p. 725.*

(c) *Re Hatton, u. s.*

not to sue in the interval is operative; and some difficulty may be felt as to what the debtor's rights will be, if, after the creditors have so agreed (either tacitly or expressly) not to sue him *for a limited time*, an action is brought against him in breach of that agreement.

It is quite clear that a covenant not to sue for a fixed period could not formerly be pleaded in bar of an action at law (a), although a covenant not to sue *in perpetuum* operated as a release. The reason of the distinction was this, namely, that in the case of the covenant not to sue *in perpetuum*, the damages recovered by the debtor in a cross action for breach of the covenant must necessarily be the same as the amount recovered by the creditor, and therefore a covenant not to sue *in perpetuum* was allowed to be pleaded in bar of the action to avoid circuity of action; whereas in the case of a covenant not to sue *for a fixed period* the damage done to the debtor by a breach of the covenant would not necessarily be the same as the amount recovered by the creditor, "and if such a covenant were allowed to operate in suspension of the action, the right of action would be altogether lost, inasmuch as it is a rule that where a personal action is once suspended by the act of the party, it is for ever gone and discharged" (b)—a result which would clearly be contrary to the intention of the parties. Accordingly, where the payee sued the maker of two promissory notes, and the defendant pleaded that after the notes became due, it was mutually agreed between the plaintiff, the defendant, and A, that A should pay to the plaintiff £25 per annum by quarterly payments, and, as long as A so paid, the right

Covenant not to sue for term certain formerly not pleadable in bar of action at law.

Rule that personal action once suspended gone for ever.

*Ford v. Beech.*

(a) *Thimbleby v. Barron*, 3 M. & W. 210.

(b) *Note (e) to Holdipp v. Otway*, 2 Wms. Saund. (1871), p. 352; and see *Ford v. Beech* (in error), 11 Q. B. 852, 867.

of action on the notes should be suspended, and that A had hitherto made the quarterly payments, it was held by the Court of Exchequer Chamber, that the plea offered no answer inasmuch as, if the plaintiff were barred of his action on the notes for any period, his right of action would by law be extinguished altogether, which appeared not to be the intention of the agreement; and that, therefore, the agreement must be construed as giving the defendant merely a right of action for breach thereof if the plaintiff sued while the payments were continued (a).

Method of preventing creditors from suing for limited time.

1. By agreement to operate as release on action brought.

*Gibbons v. Vouillon.*

This rule, however, that a personal action once suspended is for ever extinct, does not hold in all cases (b), for, besides the exception admitted from the law merchant, viz., that the acceptance of a negotiable security in payment of a debt operates as a suspension of the right of action till the security becomes due (c), there is another mode by which a right to sue may be effectually suspended. Thus in the case of *Ayloffe v. Scrimshire* (d) it is said that "it was agreed by all that a letter of licence containing the words following, viz., that, if the creditor sue, &c., within such a time, his debt shall be forfeited—such licence is pleadable in bar." This proposition was considered and followed by the Court of Common Pleas in *Gibbons v. Vouillon* (e). In this case the debtor entered into an arrangement by deed with his creditors, by which it was agreed that he should have a letter of licence for five years, during which period he should carry on the trade under the inspection of certain persons

(a) *Ford v. Beech*, 11 Q. B. 852; but see also *Beech v. Ford*, 7 Ha. 208, *post*, pp. 41, 42.

(b) *Per* Holt, C.J., and Dolben, J., in *Ayloffe v. Scrimshire*, Comberbach, p. 124.

(c) *Simon v. Lloyd*, 2 C. M. & R. 187.

(d) As reported by Carthew, p. 63.

(e) 8 C. B. 483, and S. C. 19 L. J. C. P. 74, *q. v.*

therein named; and it was provided, that if any creditor should during the continuance of the licence molest or interfere with the debtor contrary to the true intent and meaning of the indenture, *the debtor should thenceforth be relieved and discharged, &c., from all debts of the creditor* by whom the letter of licence should be so contravened, and that the indenture might be pleaded in bar to such debts accordingly. A creditor, party to the deed, having brought an action within the five years, it was held that this was a molestation or interference within the meaning of the proviso, and that the indenture operated as a defeazance, and was pleadable in bar as such. It was urged on behalf of the plaintiff that if the Court held the deed to be a release, it must be a release from the moment of its execution, but to this proposition (based on the assumption that every release, to have any operation at all, must operate from the moment when it is given) the Court declined to assent, Wilde, C. J., observing in his judgment (a)—“I do not see why parties may not agree that a certain instrument shall operate as a release from the happening of such an event. The passage in *Co. Litt.* (b) referred to by my brother Maule seems to shew that they may.” This case has been followed in numerous others (c), so that it is clear that a release *in futuro* is valid, and that an agreement to forbear from suing for a limited period may be made effectually binding on creditors by providing that in the event of a breach of such agreement the deed shall operate as a release of the debt of any creditor infringing its terms (d).

(a) 8 C. B. 500.

(b) *Co. Litt.* 274.

(c) *Per Maule, J., Belshaw v. Bush*, 11 C. B. 191, 201, *seq.*

(d) For another method by which the rule as to the suspension of a

2. Covenant not to sue and proviso that deed shall be pleadable in bar of action brought in breach of covenant.

*Walker v. Nevill.*

*Ellis v. M<sup>r</sup> Henry.*

The provision, however, adopted in *Gibbons v. Vouillon* (a) was felt to be unreasonable, for under it a creditor who contested the validity of the deed (which circumstances might justify him in doing) would, if the deed were held binding on him, lose not only his original demand, but all claim to the composition (b). To meet this objection a clause was framed which provided (after a covenant not to sue for a limited period) that the deed might "be pleaded and allowed as a bar and in discharge of all actions brought or prosecuted against the debtor by a creditor contrary to the true intent and meaning of these presents," and the Court held that a deed containing such a provision might during the limited period be pleaded in bar (c). It is conceived that this provision would, moreover, effect the purpose for which it was devised, namely, would enable a creditor to test the validity of the deed without forfeiting his debt or losing his right to receive dividends thereon; and it has been decided that an agreement by the creditors that they will not (unless default be made by the debtor) during a period of six years sue the debtor, and that if they do the deed may be pleaded as an accord and satisfaction, and in bar of any action brought during such period, does not cause the creditors who sue, and against whom the deed is successfully set up, to forfeit their debt or lose their right to dividends (d).

There is also another means by which the creditors right of action was evaded and creditors restrained from suing for a limited time, see *infra*, p. 39.

(a) 8 C. B. 483, *ante*, p. 36.

(b) *Per Maule, J.*, 11 C. B. 205.

(c) *Walker v. Nevill*, 3 H. & C. 403; S.C. 34 L. J. Ex. 73, and *cf. Corner v. Sweet*, L. R. 1 C. P. 456.

(d) *Ellis v. M<sup>r</sup> Henry*, L. R. 6 C. P. 228.

may be effectually prevented from suing until the happening of a particular event without destroying their right of action after the happening of such event, viz. by a release voidable by condition subsequent. Thus in *Co. Litt* (a) it is said that a right may be released upon condition though not for a limited period; and in *Newington v. Levy* (b), Willes, J., in giving judgment said (c), "We see no difficulty in upholding a release with a condition subsequent in accordance with the suggestion of Maule, J., in *Gibbons v. Vouillon* (d). It must have often happened that a voluntary payment, good at the time as extinguishing the debt, has been rendered void by matter subsequent, as in the event of bankruptcy of the debtor and an election by his assignees to treat the payment as a fraudulent preference; and it has never been successfully contended that the debt did not thereby revive. We can see no substantial distinction between the case of a payment avoided by subsequent events, and a release so avoided. This is not a case of temporary suspension, like *Ford v. Beech* (e); but a case in which the release will be for ever operative, unless itself subsequently avoided. The distinction is fine, but it is supported by analogy, and it gives effect to the clear intention of the parties." The judgment of the Court of Common Pleas was affirmed in error (f), and Lord (then Mr. Justice) Blackburn in delivering his judgment said, "The first question that arises is what is the effect of the release in the deed of composition pleaded in the first action? By

3. By Release with condition subsequent.

Willes, J.

Lord Blackburn.

(a) Pp. 274a, 274b, and the notes thereto.

(b) L. R. 5 C. P. 607.

(c) *Ib.* p. 611.

(d) 8 C. B. 483 at p. 491, quoting *Co. Litt*, u. s.

(e) 11 Q. B. 852, *supra*, p. 35.

(f) L. R. 6 C. P. 180.



Lord  
Blackburn.

that deed the creditors release the defendants from their respective debts in express terms; and in equally express terms it is declared that if default should be made in payment of the composition, the release should be void. The question (which has never yet arisen in a court of error) is, whether this is pleadable as a defence, where the matter which is to undo the release has not yet happened. I think it is. The old rule was that a right of action once suspended is gone for ever. To avoid that, where it was evidently contrary to what the parties intended, the Court of Exchequer Chamber, in *Ford v. Beech* (a), construed the agreement, not as suspending the plaintiff's remedy on the promissory notes there sued upon, but as giving the defendant merely a right of action for breach thereof, if the plaintiff sued whilst the payments were continued, that is, as a covenant not to sue for a limited period. It must, however, be taken to be established that, where a covenant not to sue is in terms expressed to be intended as a release, and where the rights of a surety do not intervene, it is, in order to avoid circuity of action, an answer to the plaintiff's claim. A release which in terms is subject to a defeazance amounts to a covenant not to sue, except upon the happening of the event contemplated. Such a release is not open to the objection taken in *Ford v. Beech* (a). It very rarely could happen that matter subsequent could undo that which had suspended the plaintiff's right of action, and, therefore, practically, it was enough to say that a right of action once suspended is gone for ever" (b).

A release, therefore, made subject to a defeazance will be an effectual answer to an action by any of the releasing

(a) 11 Q. B. 852.

(b) Cf. *Slater v. Jones*, L. R. 8 Ex. 186.

creditors until the happening of the event or events, on the happening of which it is to be avoided (a), and upon the happening of such event or events the creditors will be remitted to their original rights (b).

With regard, however, to the main question, how far the Court will enforce a covenant or agreement not to sue for a limited period—where there is no provision that in the event of a breach of the covenant or agreement the instrument shall be an answer to an action brought contrary to its intent—we have seen that, at law, such a covenant or agreement *simpliciter* was no answer to an action (c). But, where the contract was clear and the legal remedy inadequate, it was the practice of the Court of Chancery to interfere by injunction to restrain the breach of negative contracts (d); and there seems no ground for distinguishing the case of agreements not to sue, from other cases where such relief has been granted (e).

Operation now of simple covenant not to sue for fixed time.

Seem that the Court would prevent a breach of the covenant.

Accordingly the defendant in *Ford v. Beech* (f), and his brother A, having filed a bill for the specific performance of the agreement not to sue, which had been unsuccessfully relied on in defence of the action at law, it was held that A (if not the defendant himself) was entitled to specific performance of the agreement, since the Court by modifying

*Beech v. Ford.*

(a) Co. Litt. 274 a, b; *Newington v. Levy*, L. R. 5 C. P. 607; S.C. (in error), 6 C. P. 180.

(b) *Hall v. Levy*, L. R. 10 C. P. 154.

(c) *Ford v. Beech*, 11 Q. B. 852, ante, p. 35; *Ray v. Jones*, 19 C. B. (N.S.) 416.

(d) *Lumley v. Wagner*, 1 D. M. & G. 604.

(e) See *per* Crompton, J., *Keyes v. Elkins*, 34 L. J. Q. B. 29; *Hunt v. Hunt*, 8 Jur. N.S. 85; and *cf. per* Parke, B., *Simon v. Lloyd*, 2 C. M. & R. 187, 189; *per* Tindal, L.C.J., *Tatlock v. Smith*, 3 Moo. & P. 676.

(f) *U. s.*; ante, p. 35.

its decree could give to all parties the benefit of the agreement, whereas a Court of law, being unable to modify its judgment, could not give to one party the benefit of the agreement without depriving another party altogether of such benefit (a).

In the case of an agreement with creditors generally, by which the creditors undertake not to sue for a fixed period, in order to give the debtor time to retrieve his position, there are special reasons for the interference of the Court to prevent the breach of the agreement by any creditor, for when a creditor accedes to such an arrangement and afterwards brings an action in breach of it, "it is an attempt on his part to break faith not only with the debtor, but with every other creditor party to the arrangement. It cannot be the foundation of a cross-action, for the recovery of damages in such an action would not be equal to the loss sustained by the other creditors in the risk and prejudice to the debtor's business and credit, arising from his being subject to a judgment and execution in the action" (b).

It would seem, therefore, that since the Judicature Act 1873 (c) such an agreement would be enforced against a creditor in any division of the Court (d).

*Query.*  
Whether  
acceptance  
of a dividend under  
an assignment  
amounts to  
a release.

It is said that although there be no express provision that the creditors shall release their debts, yet the acceptance of a dividend will operate as a release where there has been a complete *cessio bonorum*. This was so laid down by Lord Campbell, in *Whitmore v. Turquand* (e): "Although this deed contains no release nor declaration

(a) *Beech v. Ford*, 7 Ha. 208, affirmed by Lord Cottenham.

(b) See the argument, *Gibbons v. Vouillon*, 19 L. J. C. P. 78.

(c) 36 & 37 Vict. c. 66, sec. 25 (11).

(d) *Mostyn v. West Mostyn Coal Co.*, 1 C. P. D. 145.

(e) 3 D. F. & J. 107, 110.

that the dividend is to be taken in full satisfaction of the debt, the arrangement is in the nature of a *cessio bonorum* under the Roman civil law, and I think when the dividend has been received, satisfaction is to be inferred" (a). These remarks were, however, extra-judicial, and considerable doubt is thrown on them by the decisions in *Eyre v. Archer* (b) and *Jones v. Morris* (c), (unless these latter cases can be distinguished on the ground that no dividend had been received), it being held in *Eyre v. Archer* (b) that a deed under the 200th section of the Bankruptcy Act, 1861, by which the debtor had assigned all his property to trustees, but which did not contain a release, was no bar to an action by a subscribing creditor.

*Eyre v. Archer.*

So far we have been occupied in examining how far an accession to a creditor's arrangement affects the right of action of an individual creditor; it remains to consider how the accession of one of several joint creditors affects the position and remedies of the others.

Accession of one co-creditor as affecting others.

The release of a debt or claim by one of several to whom it is owing, operates as a bar to all (d). The rule is laid down generally in Rolle's Abridgment:—"If there are divers obligees, and one release, it bars all" (e), the reason being that the release of a joint

Release by one co-creditor bars all.

(a) *Whitmore v. Turquand*, 3 D. F. & J. 110, per Lord Campbell; and see cases cited ante p. 7, note (a).

(b) 16 C. B. (N.S.) 638, followed in *Clarke v. Williams*, 3 H. & C. 508 & 1001 (in Exch. Cha.).

(c) 6 B. & S. 198.

(d) In the case, however, of a release by a person having two debts owing to him, one as a member of a partnership and the other to him privately, he will in the absence of evidence to the contrary be taken to have released the latter only. *Bain v. Cooper*, 9 M. & W. 701, and see *infra*, p. 91.

Private and partnership debt.

(e) 2 Ro. Abr. 410 D.; *Wilkinson v. Lindo*, 7 M. & W. 81.

Accord and satisfaction with one co-creditor.

*Secus* :—  
covenant  
not to sue.

Fraudulent  
release by  
co-creditor  
set aside.

obligation operates as an extinguishment of the debt. In fact, the rule at law was, that whatever operated as an answer to the demand on which an action was brought as against one of co-plaintiffs, suing on a joint claim, was an answer to all (a). Hence accord and satisfaction made with and accepted by one of more co-creditors is an answer as against all (b). On the death of the co-creditor who has disqualified himself for suing, the right of action does not revive, for the rule holds in this case that a right of action once suspended by the act of the party is gone for ever (c).

For the purpose, however, of affording an answer to an action by several co-creditors, a *covenant* by one *not to sue* is not equivalent to a *release* (d), although a covenant *by them all* not to sue might have been pleaded as a release to avoid circuity of action (e). Accordingly, a covenant by one partner *in his own name* not to sue for a partnership debt will not release the debt or be an answer to an action by all the partners, but the debtor's remedy will be against the covenanting partner for breach of his covenant (f).

A release given, or accord and satisfaction accepted, by one co-creditor in fraud of the others and in collusion with the debtor, will not be allowed to be set up in answer to the claim of the defrauded co-creditors (g).

(a) *Gibson v. Winter*, 5 B. & Ad. 96; *per* Parke, B., *Wilkinson v. Lindo*, 7 M. & W. 87.

(b) *Wallace v. Kelsall*, 7 M. & W. 264; *Crowe v. Lysaght*, 4 L. T. (N.S.) 744; but see *Gordon v. Ellis*, 8 Sco. N. R. 290; 2 C. B. 821.

(c) *Crowe v. Lysaght*, *u. s.*

(d) *Walmesley v. Cooper*, 11 A. & E. 216.

(e) *Deux v. Jeffreys*, Cro. Eliz. 352.

(f) *Walmesley v. Cooper*, 11 A. & E. 216.

(g) *Piercey v. Fynney*, 12 Eq. 69; for the former practice in Courts of Law with regard to fraudulent releases, see *Barker v. Richardson*, 1 Y. & J. 362; *Phillips v. Clagett*, 11 M. & W. 84; *Rawstorne v. Gandell*, 15 M. & W. 304.

One of several executors may release a debt (a). But it has been held, that a release by two of three assignees under a bankruptcy to a person who knew they were assignees was not effectual (b).

Releases by executors, &c.

We have already seen that a covenant not to sue by one co-creditor does not prevent his suing with the other co-creditors. Is there any exception in the case of *partners*, and, where a partner purports to covenant *on behalf of his firm*, has he any authority to bind his co-partners by such a covenant? One partner has no implied authority to bind his co-partners *by deed* (c), and "a general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose" (d). But a partner may bind his co-partner by deed if he have special authority under seal, either by the partnership articles or otherwise, for that purpose (e), and a deed executed by one partner in the name *and in the presence* of his co-partners will bind the firm (f).

Power of partner to bind co-partners.

No implied authority to bind them by deed.

There is, however, a decision of Lord Chancellor (Ir.) Brady, that the case of a composition deed forms an exception to the rule that one partner has no authority to

*Query.* Whether he can bind them by execution of composition deed.

(a) *Herbert v. Pigott*, 2 C. & M. 384, and see Conv. Act, 1881, sec. 37; and see Sheppard's Touchstone, p. 335: "If there be two or more executors and one of them alone release a debt or duty to the testator before judgment in a suit, had by all the executors against the debtor, this will bar all the rest;" cf. *Jacomb v. Harwood*, 2 Ves. Sen. 265.

(b) *Williams v. Walsby*, 4 Esp. 220.

(c) *Harrison v. Jackson*, 7 T. R. 207; *Green v. Sutton*, 2 M. & R. 271; but see *ante*, p. 43, and *Hawkshaw v. Parkins*, 2 Swst. 539.

(d) *Per* Lord Kenyon, C.J., 7 T. R. 210.

(e) *Ib.*

(f) *Ball v. Dunsterville*, 4 T. R. 313, and see *Burn v. Burn*, 3 Ves. 573; Story Ptnp. § 120; *Brutton v. Burton*, 1 Chitt. 707, but *contra*, *Steiglitz v. Egginton*, Holt, N. P. C. 141.

*Dudgeon v. O'Connel.* bind his partners by deed (a), and he held that a joint-stock banking company were bound by a trust deed for the benefit of creditors, containing a *covenant not to sue*, which was executed by their public officer (and which carried into effect an arrangement that had been assented to by their public officer and branch manager at a meeting of the creditors), although neither the company nor the directors had given any authority to execute it, and the arrangement was an improvident one for them (a). The Lord Chancellor in his judgment observed:—"It is said Mr. Reynolds had not authority to execute deeds for the bank. He had not technically, perhaps, the power to bind them; but he had power to concur in an arrangement for the settlement of the debts of a person indebted to the bank—a transaction which is of every day's occurrence. He was their public officer and was a partner; and though there are some deeds which he could not execute so as to bind his co-partners, I much doubt, whether this, being a composition deed, is one which he could not execute. He could release the whole debt; therefore it seems to follow that he could forego part of it by a composition deed. I think, therefore, it could not be argued that the bank could repudiate this deed even on the very day it was made."

Should it be held that the proposition here laid down by the Lord Chancellor is not correct, yet, where the agreement (though by deed) operates as accord and satisfaction with one partner, the firm will be bound (b); and, in any case it seems that a covenant entered into by a

(a) *Dudgeon v. O'Connel*, 12 Ir. Eq. 566; but see *contra*, *Bain v. Cooper*, 9 M. & W. 701, *post*, p. 91.

(b) *Wallace v. Kelsall*, 7 M. & W. 264; *Crowe v. Iysaght*, 4 L. T. (N.S.) 744.

partner in the name of his firm will be binding on him separately (a), so as to render him liable in damages for the breach of it.

A person, who comes in under an arrangement in respect of a bill of exchange on which the debtor is liable, impliedly undertakes that the bill is in his own hands, and if the debtor is obliged to pay it to the real holder he may recover the amount from the person purporting to come in under the arrangement in respect of the bill. Thus in *Hawley v. Beverly* (b) the plaintiff had accepted a bill of exchange drawn by the defendant. Before it became due, the plaintiff called a meeting of his creditors, which was attended by W. on behalf of the defendant. The creditors agreed to accept a composition, and a deed containing a release was prepared, and executed by W. on behalf of the defendant. The defendant, by his own desire, was supplied with goods, which he accepted in lieu of the amount of his composition. Prior to the meeting of the creditors the defendant had indorsed the bill to A., who subsequently sued the plaintiff on it and recovered the amount of the bill with interest and costs. After the plaintiff had made this payment, the defendant returned the goods, which he had accepted in lieu of the composition, but the plaintiff declined to receive them, and brought an action to recover the amount he had been compelled to pay to A. It was held that the plaintiff was entitled to recover. Maule, J., in giving judgment said (c) :—"After the arrangement that was entered into, it was clearly the duty of the defendant to indemnify the

Person  
acceding in  
respect of  
a bill im-  
pliedly un-  
dertakes  
that it is  
in his own  
hands.

*Hawley v.  
Beverly.*

(a) *Elliot v. Davis*, 2 Bos. & Pul. 338.

(b) 6 Scott, N. R. 837, *coram*, Tindal, C.J., Erskine, Maule, Cullen and Cresswell, JJ.

(c) *Ib.* p. 842.



plaintiff against the bill: the payment by the plaintiff may therefore be said to have been a payment of so much money on account or to the use of the defendant."

If, however, the debtor make the payment, voluntarily, to a person whom he knows to be merely the creditor's agent and not a holder for value, it seems he cannot subsequently recover a sum so paid (a).

(a) *Gibson v. Bruce*, 5 M. & Gr. 399.

## CHAPTER V.

### IN WHAT CASES THE AGREEMENT IS NOT A BAR TO AN ACTION.

#### 1. *Default and its consequences.*

A DEBTOR who has entered into an arrangement with his creditors must, to entitle him to the benefit of the agreement, show that he has strictly complied with its terms. If a time be fixed, within which he is to perform certain acts, he must perform them within the appointed time; if no time be fixed, then a reasonable time will be allowed him for the performance of the acts required of him (a); but if he fail to perform his part of the agreement within the appointed time, or a reasonable time, as the case may be, the creditors, or those particular creditors towards whom he has made default, will be remitted to their original rights (b).

Debtor must strictly fulfil terms of agreement.

Default remits creditors to their original rights.

Thus, in *Oughton v. Trotter* (c) the defendant's creditors resolved to accept a composition payable by two instalments to be secured by the promissory notes of the defendant and another, "the notes to be given within

*Oughton v. Trotter.*

(a) *Per* Littledale, J., in *Oughton v. Trotter*, 2 Nev. & M. 71.

(b) As to the position of the debtor and creditors respectively, in the interval to elapse before the performance of the agreement, see *ante*, p. 34 *seq.*

(c) 2 Nev. & M. 71.

fourteen days," and it was held, that the creditors who did not receive their notes within fourteen days were remitted to their original right of action (a).

Duties imposed on debtor by particular agreements and effect of default. Assignments for benefit of creditors.

It will be useful to consider, what are the usual incidents of these agreements, and the nature of the acts required of the debtor, default in which may remit creditors to their original rights.

In the case of assignments for the benefit of creditors questions rarely arise as to default on the part of the debtor (b). His part is generally ended with the original execution of the deed; but where (as is sometimes the case) the instrument contains a covenant to pay some proportional part of his income to a trustee for the creditors, until the whole debt is discharged, a default in making such payment would be governed by the same principle as a default in payment of a composition.

Composition agreements.

In composition agreements (properly so called) the terms of the agreement usually are, that the creditors shall accept payment at a specified time of a certain composition in satisfaction of their claims; in such a case, it is necessary for the debtor to establish, that he has paid or tendered (c) the composition within the appointed time (or, if none be fixed, within a reasonable time (d)) if he relies on the agreement as a defence to an action by a creditor on his original demand. Thus Sir George Rose, in *Ex parte Bateson* (e), said: "As default was made in the

(a) Cf. also *Walker v. Seaborne*, 1 Taunt 526.

(b) See, however, *contra*, *Cork v. Saunders*, 1 B. & Ald. 49; *Tatlock v. Smith*, 3 M. & P. 676; and see also *Hyde v. Watts*, 12 M. & W. 254, *infra*, p. 80 *seq.*

(c) As to whether a tender to a clerk is sufficient, see *Finch v. Boning* 4 C. P. D. 143.

(d) *Per* Littledale, J., *Oughton v. Trotter*, 2 Nev. & M. 71.

(e) 1 M. D. & De G. 289.

payment of the composition, the creditor has a right to resort to the original debt. The principle on which these cases of composition have been long settled is, that the mere agreement to accept a composition does not amount to a release of the debt, unless the composition is fully paid."

It is not sufficient that the debtor was ready and willing to pay, he must either have *paid* or *tendered* the amount. This was early decided in *Cranley v. Hilliary* (a). There a resolution was passed by the defendant's creditors, and signed by the plaintiff for himself and his partner, that they should accept a composition payable by two instalments, to be secured by promissory notes to be given by the defendant, and that the defendant should assign to the creditors certain debts mentioned in the resolution, upon which the creditors should execute a general release. It was proved that the assignment was executed by the defendant, and that all the other creditors, except the plaintiff and his partner, received their composition and executed a general release, *and the plaintiff might have received his promissory notes if he had applied for them, but there was no evidence that the defendant had given or tendered them to the plaintiff, or that the latter had ever applied for them.* Under these circumstances judgment was given for the plaintiff, and the Court refused a rule for a new trial, Lord Ellenborough saying, "The rule is that the person to be discharged is bound to do the act which is to discharge him, and not the other party" (b).

Debtor  
must prove  
payment or  
tender.

*Cranley v.  
Hilliary.*

(a) 2 M. & S. 120, overruling *Boothby v. Sowden*, 3 Camp. 175; see also *Ex parte Charlton*, 6 Chy. D. 48.

(b) Cf. *Rosling v. Muggeridge*, 16 M. & W. 181, and cf. also *Hazard v. Mare*, 6 H. & N. 434; *Edwards v. Coombe*, L. R. 7 C. P. 519; *Re Hatton*, 7 Chy. 723.

*Fessard v. Mugnier.*

Whether tender to creditor resident abroad necessary. Erle, C.J.

The case of *Fessard v. Mugnier* (a) is a strong illustration of the same principle. The plaintiff sued on a foreign bill of exchange drawn by the plaintiff at Paris upon, and accepted by, the defendant; the defendant pleaded a composition deed, made and registered under the Bankruptcy Act, 1861 while the plaintiff resided abroad, by which the defendant covenanted to pay a composition of 5s. in the pound to his creditors on a particular day (then past), and that the defendant had always been, and still was, ready and willing to pay to the plaintiff the composition. The Court held the plea bad, Erle, C.J., giving judgment as follows:—"I consider the plea is bad for not showing a payment or tender of the composition to the plaintiff. . . . As to the excuse for not tendering the composition because the plaintiff was in Paris when it became payable, I think the authorities establish that if the plaintiff was in England when the contract was made, and he had afterwards gone abroad, it would not have been the duty of the defendant to follow him out of the realm in order to pay or tender him the money. But here it appears that the contract was a French contract, made when the plaintiff was residing in Paris, who was living there when the composition-deed was executed and registered. I therefore think that the plaintiff's residence abroad is no excuse for the defendant not tendering the composition to him" (b).

(a) 18 C. B. (N.S.) 286.

Relevancy of decisions under Bankruptcy Act, 1861.

(b) On the relevancy of cases decided under the Bankruptcy Act, 1861, see the remarks of Pollock, C.B., in *Hazard v. Mare*, 30 L. J. Ex. 101: "It is to be observed that the only consequence the statute attaches to the agreement to accept a composition (beside the binding the non-assenting creditors) is that the Court shall annul the adjudication and supersede or dismiss the fiat or petition. The effect of the

Although the onus thus lies on the debtor to prove payment or tender, it has been said in one case (a) that it is not necessary that he should make a formal tender, but that it is sufficient if he was ready to pay and expressed his willingness to do so at the appointed time, but this proposition must be regarded as very doubtful.

Whether formal tender necessary.

In some cases, however, the creditor will be taken to have waived a tender, e.g. where he has positively refused to take less than his original demand (b), and in such case a tender might be unnecessary; and it was intimated by Pollock, C.B., in *Hazard v. Mare* (c), dealing with the supposed case of a recusant creditor whose abode was not known and who avoided a tender, that "a formal tender might not be required if a reasonable effort to pay were made."

Waiver of tender.

Although the purport of a composition agreement usually is, that *payment* of the composition is to be taken by the creditors in satisfaction of their claims, yet (as has been already noticed) (d) the creditors *may* accept the *new agreement itself* and the *promises* of the debtor therein, and not the *performance* of the agreement, in substitution for or satisfaction of their debts. In such a case,

Results of default where agreement itself is taken in satisfaction.

agreement as a defence or answer to the original claim is not expressed, but left as a common law consequence."

(a) *Ex parte Hemmingway*, 26 L. T. (N.S.) 298.

(b) *Reay v. White*, 3 Tyr. 596; and see *Scarfe v. Morgan*, 4 M. & W. 280, and *The Norway v. Ashburner*, 13 W. R. 1085, as to the conduct which would amount to a waiver of a tender. In the last case it was said (p. 1087): "If the demand of the larger sum was so made that it amounted to an announcement by the master that it was useless to tender any smaller sum, for that, if tendered, it would be refused, that would amount to a dispensation with any tender, generally speaking."

What amounts to waiver of tender.

(c) 30 L. J. Ex. 101, and *cf. per* Willes, J., in *Edwards v. Coombe*, 7 C. P. 522.

(d) *Ante*, p. 33, and see *per* Mellish, L.J., 7 Chy. 726.

the creditors having accepted the agreement itself, and not the performance of it, in satisfaction of their debts, if the agreement were not performed, their only remedy would be by an action for the breach of it, and there would be no revival of the original debt (*a*). In every case it is a question of construction on the instrument, what was the agreement between the parties; but the intention of the parties, that the agreement itself was to be accepted in satisfaction, will have to be clearly expressed to displace the presumption that on default the original debt was to revive (*b*); for as a general rule "the non-payment of the composition is the failure of a condition going to the whole root of the arrangement, and the original debt remains and may be resorted to," notwithstanding the agreement (*c*).

Where negotiable instruments received in satisfaction—default in payment.

The same principles apply to the case where the creditors accept a composition secured by promissory notes (with or without a surety) in satisfaction of their debts. It is a question of construction in each case, whether the mere giving of the notes, or the giving of the notes coupled with their payment at maturity, is accepted by the creditors in satisfaction (*d*). In the former case, the debtor's liability on the original debt will be gone when the notes are given, and if they are not paid at maturity the creditors will only be able to sue for the amount of the composition (*e*); in the latter, on default in payment of the notes, the original debt will revive (*f*),

(*a*) *Per* Parke, B. 1 Ex. 608.

(*b*) *Evans v. Powis*, 1 Ex. 601; *per* Grove, J., in *Edwards v. Hancher*, 1 C. P. D. 118.

(*c*) *Per* Willes, J., *Edwards v. Coombe*, 7 C. P. 523.

(*d*) See *Constable v. Andrew*, 2 C. & M. 298.

(*e*) *Per* James, L.J., *Re Hatton*, 7 Chy. 725; *per* Parke, B. *Evans v. Powis*, 1 Ex. 601.

(*f*) *Edwards v. Hancher*, 1 C. P. D. 111.

and if there be a surety to the notes, the creditors may after default enforce payment of the notes from the surety, and sue the debtor for the original debt giving credit for the sums received from the surety (a). Of course, whether the agreement be to accept in satisfaction the notes alone, or the notes coupled with their payment at maturity, in either case, if the notes are not given or tendered at the appointed time, the creditors will be remitted to their original rights (b).

The preceding observations, and the authorities on which they are based, serve to show how strict is the rule that the debtor's default will remit a creditor to his original rights. There are, however, exceptions to the rule.

Exceptions to rule that default remits creditors to their original rights.

Although the debtor's default remits the creditor to his original rights, the creditor may by subsequent conduct have waived the default (c).

1. Waiver of default.

In *Shipton v. Casson* (d), the defendant being indebted to the plaintiffs, an agreement was entered into between the plaintiffs and several other of the defendant's creditors and Henry Casson, the defendant's father, by which, in consideration of Henry Casson agreeing to guarantee the payment of the debts, the creditors agreed to accept payment by three instalments payable at four, eight, and twelve months respectively. On the day after the first instalment became due, Henry Casson remitted to the plaintiffs the amount of the first instalment, partly in bills not then due and partly in bank notes, with the

*Shipton v. Casson.*

(a) *Glegg v. Gilbey*, 2 Q. B. Div. 209; 46 L. J. C. L. 325; *Ex parte Gilbey*, 8 Chy. Div. 248.

(b) *Cranley v. Hilliary*, 2 M. & S. 120.

(c) *Shipton v. Casson*, 5 B. & C. 378; *Hyde v. Watts*, 12 M. & W. 254.

(d) *U. s.*



request, "Please credit my son's account for the amount and acknowledge the receipt in course of post." The plaintiffs received the letter and remittances, which on the 29th March they acknowledged as follows: "Yours of the 27th inst. is received this day, enclosing bills and note value £242 10s. 6d., which will pass to your son's account when paid." The plaintiffs afterwards instituted an action against the defendant before the second instalment was due. The agreement was pleaded, and the Court held that though the plaintiffs were not bound to accept the remittance, but might have returned it and insisted upon their right of action, yet as they made the amount available to their own purposes, and undertook to place it to the credit of the defendant's account, it must be taken as against the plaintiffs that there was no objection to the nature of the remittance, or the time when it was made (a).

2. Relief  
on ground  
of mistake  
or accident.

Lord  
Hardwicke.

Where there has been no waiver by the creditor, it is a question whether the Court will ever relieve the debtor from the results of his default. On this point Lord Hardwicke said (b): "The general rule of equity with respect to the composition of debts has been rightly laid down, that the Court will not dispense with the point of time in compositions; for where a creditor agrees to take less than his debt so that it be paid precisely at the day, and the debtor fails in payment, he cannot be relieved."

(a) (*cf.* also *Norton v. Wood*, 1 Rus. & M. 178; and *per James, L.J., Ex parte Waterer*, 43 L. J. Bk. 25, 26.

(b) *Ex parte Bennett*, 2 Atk. 527; *cf. Sewell v. Musson*, 1 Vern, 210; *Leigh v. Barry*, 3 Atk. 583, 585. So where there was a stipulation in a mortgage for payment by instalments, and that on default the whole debt should become payable, the Court declined to regard it as a penalty or to relieve against default. *Sterne v. Beck*, 1 De G. J. & S. 595; and see *Thompson v. Hudson*, L. R. 4 H. L. 1, reversing the decision of the Courts below, 2 Chy. 255 & 2 Eq. 612.

This statement of the impossibility of relieving against default must, however, be accepted with some reservation as there are modern *dicta* somewhat at variance with it. Thus in *Newington v. Levy* (a), Kelly, C.B., expressed his opinion, that where a replication averred default as avoiding a release in a composition-deed, it was a good equitable rejoinder that the defendant, by reason of a mere mistake as to the day on which the composition was payable, omitted to tender it to the plaintiff on the day fixed, but that he tendered it two days later. “No doubt,” he said, “at law, the instalment being payable on the 6th of April, and there being a proviso in the deed making the release defeasible in case of default, and default having been made, the release became void and no answer to the action; but in equity it would be otherwise; for it is always a good answer in equity to shew that the default arose from a mere mistake, and that the money was tendered within a reasonable time and before suit, or before the situation of the parties had been altered, or the other party had proceeded to avail himself of the default.” So James, L.J., in *Re Hatton* (b) observed: “There may be cases in which by accident, and not by default of the debtor, the composition is not duly paid, and then no doubt this Court would relieve the debtor from the effect of such an accident, and remove any injustice;” and Coleridge, C.J., in *Newell v. Van Praagh* (c) said: “As regards the plaintiff there was a failure to pay the first instalment, and on such default hostile proceedings were immediately taken and an application made to commit the defendant. It might possibly have been contended, if such proceedings had

Kelly, C.B.

James,  
L.J.Coleridge,  
C.J.

(a) 6 C. P. 180, 185.

(b) 7 Chy. 723, 726.

(c) 9 C. P. 96, 98.

*Contra*  
*Mellish,*  
*L.J.*

not been taken, and payment of the instalment had been tendered before the creditor had taken any steps to replace himself in his former position, that the composition was still available." Mellish, L.J., however, in *Ex parte Peacock, Re Duffield* (a), intimated his opinion, that relief could only be granted where some act had been done on the part of the creditor, which rendered it inequitable that he should enforce his strict legal rights.

*Mackenzie*  
*v. Mac-*  
*kenzie.*

In *Mackenzie v. Mackenzie* (b) Lord Eldon, after affirming the principle that a composition is as a rule not binding on a creditor unless absolutely and strictly fulfilled, found as a fact that there were circumstances in that case which rendered it equitable to restrain certain creditors from suing on their bonds at law, though the circumstances as reported do not seem to be such as would induce a Court to come to the same conclusion at the present day.

Summary.

The result of the cases seems to be, that though the Court would relieve against default to prevent injustice being done, yet some special circumstances of mistake or accident must be shown to entitle the debtor to such interference.

3. Creditor  
who has  
had benefit  
of fraudulent  
agreement  
not allowed  
to take  
advantage  
of  
default.

A creditor who, under a secret agreement in fraud of the other creditors, has received more than the amount of the composition, will not be allowed to take advantage of the debtor's default in payment of the composition agreed on (c).

The question sometimes arises, in cases where a trustee is appointed to receive the composition and distribute

(a) 8 Chy. 682, 688.

(b) 16 Ves. 372.

(c) *Ex parte Oliver*, 4 De G. & Sm. 354, and see also *Watts v. Hyde*, 17 L. J. Chy. 39, *infra*, pp. 81, 162.

it among the creditors, or to perform some other act, whether default on the part of the trustee will remit the creditors to their original rights. It appears that it will not so do.

Default of trustee not usually default of debtor.

The remarks of Bayley, J., in *Cork v. Saunders* (a) (though the arrangement there was an assignment for the benefit of creditors and not a composition) bear on this point. "The plaintiff," he said, "confides in the trustees that they will perform the duties reposed in them: this they neglect to do, and they postpone the period at which they ought to sell. The non-division, however, of the property cannot, under the circumstances, remit the creditor to his original rights. The parties not having provided for that event by the terms of the agreement, it appears to me that their only remedy is in equity. Suppose the trustees had refused to sell, and the defendant had urged them on; could the plaintiff have sued in that case? The conduct of the defendant in respect of the postponement amounts only to this, that he does not find fault with the trustees. But I do not think that that puts the plaintiff in a better position than if the postponement had been the mere act of the trustees."

Bayley, J.

In *Ex parte Waterer* (b), (which arose under sec. 126 of the Bankruptcy Act, 1869), the creditors had passed resolutions for a composition, appointing H. A. "trustee in the matter." The trustee did not pay or tender the composition to one of the creditors, but (wrongly) required him to prove his debt. The creditor thereupon sued the debtor for his original debt. James and Mellish, L.JJ., intimated during the argument that the appoint-

*Ex parte Waterer.*

(a) 1 B. & Ald. 49.

(b) 43 L. J. Bk. 25.

ment of a trustee was to avoid the difficulty as to tender, that the trustee need not tender, but the creditors must go to their own trustee for payment, and held that the default and mistake had been on the part of the *agent of the creditors*, which could not be allowed to prejudice the debtor.

Creditor  
excluded  
by trustee  
from  
benefit of  
arrange-  
ment not  
remitted to  
his original  
rights.

*Campbell v.  
Im Thurm.*

In *Campbell v. Im Thurm* (a) the same view was taken. Resolutions under sec. 126 of the Bankruptcy Act, 1869, had been passed by the creditors, for the acceptance of a composition and the appointment of a trustee for its receipt and distribution; and a sum sufficient to pay the composition had been duly paid to the trustee. The plaintiffs (who were creditors of the defendants on a bill of exchange accepted by the latter), not having received their composition, brought an action on the bill. The defendants pleaded the composition resolutions and the receipt by the trustee of the amount of the composition. To this the plaintiffs replied that the amount of the composition due to them was not paid or tendered to them, but the trustee, *by the direction, request, and procurement of the defendants*, refused to pay the same to the plaintiffs. This replication was held to be bad, on the ground that the defendants were discharged on the payment to the trustee of money applicable to and sufficient to pay the composition. Brett, J., in his judgment (in which Archibald, J., concurred), after commenting on the evidence of the alleged direction not to pay, said:

Brett, J.

“The moment that the trustee had in his hands sufficient to pay the composition to all the creditors I think the composition was complete. He was bound to pay, and such a direction was futile as against the rights of the creditors, and the duty of the trustee was to hold the

(a) 1 C. P. D. 267.

money for the creditors. So even if there had been a direction on the part of the debtor I think the non-payment of the composition would have been a default by the trustee, but it would not have remitted the creditor to his original debt. . . . It must be assumed on the demurrer that the refusal of the trustee to pay was the result of a direction given him by the defendants, but if I am right in holding that the trustee was not entitled to act on the direction, then, there being no allegation of any fraud in the transaction, the replication is insufficient." Lindley, J., after dealing with the evidence, said (a): "If I rightly understand *Ex parte Waterer* (b), the effect of that decision is that the first part of the replication, which merely states that the composition has not been paid or tendered, would not alone be a sufficient answer to the plea, but the replication goes on to say that this was done by the direction, request, or procurement of the defendants. *If the result of that was that the plaintiffs were not cestui que trusts under and entitled to the benefit of the composition*, I should have thought that the replication was good, but it seems to me to amount only to a statement that *though the plaintiffs were cestui que trusts, the defendants told the trustee not to pay them*. I do not see that the legal consequences of that is to defeat the composition."

These observations of Lindley, J., should be carefully observed, for in them seems to be found the distinction between the case which was then before the Court and *Garrard v. Woolner* (c). In the latter case, the plaintiff and other creditors of the defendants passed resolutions,

Secus:  
*Garrard v.*  
*Woolner.*

Creditor  
excluded  
by the  
debtor re-  
mitted to  
his original  
rights.

(a) *Ib.* p. 279.

(b) 43 L. J. Bk. 25; *sup.* p. 59.

(c) 8 Bing. 258.

*Garrard v.*  
*Woolner.*

that the defendants should assign their property to trustees for the benefit of their creditors, and that the latter should execute a composition deed. The plaintiff was put down as a creditor for £1000, and signed the resolutions. Circumstances subsequently came to the knowledge of the trustees, which led them to believe that the acceptances, in respect of which the plaintiff claimed, were drawn in pursuance of a usurious contract, and thereupon their attorney wrote to the defendant's attorney a letter, stating, "*Messrs. Woolner's trustees* are of opinion that after the evidence given by Mr. L. they would not be justified in allowing Mr. Garrard to rank as a creditor. If you should be desired by Mr. Garrard to proceed against Messrs. Woolner, *I will thank you to send the writ to me.*" The plaintiff thereupon brought his action, and the Court (Tindal, C.J., Park, Bosanquet, and Alderson, JJ.) held, that the refusal to admit the plaintiff to the benefit of the arrangement remitted him to his original rights. It was not suggested that the defendants were not responsible for the plaintiff's exclusion, and it must be taken that the attorney, in writing the letter by which the refusal was communicated, was acting not merely for the trustees, but for the debtors (whose attorney the letter itself shows that he was). The decision rests on the ground that the plaintiff was excluded by *the defendants* from the benefit of the arrangement, or, in other words, that they declared the plaintiff not to be a *cestui que trust*, and thereby released him from the obligations of his agreement (a).

Interposi-  
tion of  
trustee will  
not always  
relieve  
debtor  
from duty  
of tender.

It must not, however, be assumed that in all cases in which a trustee is interposed the debtor will be relieved from the duty of tender, or that placing the necessary

(a) Cf. *per* Tindal, C.J., 8 Bing. 264; *per* Park, J., *ib.* p. 266.

funds in the hands of the trustee will be a sufficient performance of the agreement, so as to prevent creditors from being remitted to their original rights by non-receipt of the agreed composition. It must in all cases depend on the construction of the agreement, and whether the trustee thereby becomes the *agent of the creditors* for the receipt of the composition.

It is usually stated that a default by the debtor remits the creditor "to his original rights;" is this an accurate statement of the result of default, or would it more correctly be said to give rise to a new cause of action? The distinction may be of great importance in reference to the Statute of Limitations.

Does default remit a creditor to his original right or give rise to a fresh cause of action?

The proposition that default remits the creditor to his *original* rights seems necessary to the decision in *Newell v. Van Praagh* (a), though this case is not conclusive, as it arose out of a composition under the Bankruptcy Act, 1869. The plaintiff, there, had recovered judgment against the defendant, and an order was made under Sec. 5 of the Debtors' Act, 1869, for payment of the debt by monthly instalments. Three of these instalments were paid, and the defendant then filed a petition for liquidation, and his creditors passed resolutions for composition. Default was made by the defendant in payment of the composition, and further instalments under the judge's order having become due, and being unpaid, application was made for the committal of the defendant for non-compliance with the judge's order. The Court of Common Pleas (b) held that the plaintiff was remitted to his original position, and consequently the order for the defendant's committal might be made.

Statute of Limitations.

*Newell v. Van Praagh.*

(a) 9 C. P. 96.

(b) Coleridge, C.J., Keating, Brett, and Denman, JJ.



*Slater v.  
Jones.*

On the other hand, in the previous case of *Slater v. Jones* (a), Lord (then Mr. Baron) Bramwell suggested, that a resolution for acceptance of a composition contains two implied terms, one by the creditors that all will forbear to sue until default, the other by the debtor that, in case he fails to pay the composition at the time agreed on, he will pay the whole debt. "For suppose a creditor accepts a composition on a debt four years old, payable at the end of two years, and then the debtor makes default, is the creditor to be bound to sue on his original debt? If so, he will fail, for the Statute of Limitations would be a good defence, *whereas if there is a new agreement by the debtor at the date of the composition resolution, the creditor's remedy would be preserved*" (b).

Bramwell,  
B.

The suggestion, however, that a composition agreement contains an implied promise to pay the whole debt upon default in payment of the composition, does not seem satisfactory, nor is it altogether in keeping with previous decisions. Two points seem clearly established by the authorities :

Statutory  
period runs  
though  
creditors  
under  
agreement  
not to sue.

First, that arrangements with creditors (other than composition arrangements strictly so called), by which the creditors are bound not to sue, do not prevent time running

(a) L. R. 8 Ex. 186, 194.

*Hemp v.  
Garland.*

(b) Supposing, as is here intimated, that default does not remit a creditor to his original rights but gives rise to a fresh cause of action, it would appear that time would begin to run not from the new promise but from the default. If *Hemp v. Garland* (4 Q. B. 519) is sound, to prove that default was made in the payment of any instalment, and that the statutory period had elapsed since such default, would be a sufficient defence, as well in respect of the instalments due within that period, as in respect of those due prior thereto. This case has, however, been doubted in America (*Belloc v. Davis*, 38 Cal. 242, 252), and, as is pointed out in *Banning on Limitations*, p. 26, is at variance with the principle that no one is obliged to take advantage of a forfeiture, but the point is not one likely to occur in practice.

against the creditors during the period during which they are so bound.

Secondly, that a trust for payment of debts in a particular manner, or an admission of the existence of a debt, coupled with a declaration of inability to pay or with a provision for the acceptance of a smaller sum in satisfaction, is not a sufficient acknowledgment to take a debt out of the statute, whether a payment is made under the trust or agreement or not.

Admission of the debt for purposes of a trust for payment of debts not an acknowledgment within the statute.

The authority for the first proposition is *Fuller v. Redman* (No. 2) (a). The question there arose as to a claim by a creditor to come in under an administration decree made in July 1856. The claim, which was more than six years old, was opposed on the ground that it was statute-barred; but reliance was placed on the fact, that in 1847 the testator had called his creditors together, and they had granted him a letter of licence for three years, which was signed by the creditor in question, though the amount of his debt did not appear in the document except by reference. It was contended that the letter of licence, and contract not to sue for three years, suspended the operation of the statute for that period; but Lord Romilly decided the contrary, saying, "*If there had been a covenant against setting up the statute for six years after the expiration of the licence, it would be so (b); but, unless provided against, the statute runs from the time when the debt accrued*" (c).

Time runs unless there is agreement not to plead statute, *Fuller v. Redman* (No. 2).

(a) 26 Beav. 614.

(b) As to agreements to waive the Statute of Limitations, see *Lade v. Trill*, 6 Jur. 272 (Knight Bruce, V.C.); *East India Co. v. Paul*, 7 Mo. P. C. C. 85, per Lord Campbell, at p. 112; and see *infra*, p. 200, n. (a).

(c) See also *Ex parte Topping*, 34 L. J. Bkcy. 44, *infra*, p. 67. There it was not argued that the statutory period was suspended while the

Qualified admission of debt no acknowledgment for purposes of statute.

*Davis v. Edwards.*

The second of the above propositions is supported by several decisions. Thus, in *Davis v. Edwards* (a), the plaintiff sued, as executor of a person named Johnson, for principal and interest due on a promissory note, made by the defendants and M., and dated the 13th Jan., 1840. Interest had been paid on the note by M. up to 1844, when he took the benefit of the Insolvent Debtors' Act, and inserted the note in his Schedule, and the name of Johnson as a creditor for the note. In 1848 a dividend was paid by order of the Insolvent Debtors' Court on account of the note. The plaintiffs contended that the insertion of the debt in the schedule, and this payment, took the debt out of the Statute of Limitations; the Court (b) held the contrary. Parke, B., in his judgment (c), adopted the principle "that a part payment, in order to take a case out of the statute, must be made on account of a larger sum thereby admitted to be due, and *must include a promise to pay the remainder*" (d).

*Everett v. Robertson.*

So, in *Everett v. Robertson* (e), the defendant had filed a petition under sec. 2 of Stat. 7 & 8 Vict. c. 96, stating that he was unable to pay his debts in full, that the schedule annexed to his petition contained "*a full and true account of his debts*," and that for the payment of such debts he proposed to assign all his estate for the equal benefit of his creditors. The debt due to the plaintiff was accurately stated in the schedule. The Court (Lord

inspectorship arrangement was on foot, but the debt (the date of which is not given) may have been barred prior to the inspectorship arrangement.

(a) 7 Exch. 22.

(b) Pollock, C.B., Parke, Alderson, and Platt, BB.

(c) *Ib.* p. 25.

(d) *Cf. per* Lord Cranworth, *Ex parte Topping, re Levey*, 34 L. J. Bk. 44, *infra*, p. 67.

(e) 1 Ell. & Ell. 16.

Campbell, C.J., Wightman, and Hill, JJ.) held that this was not an acknowledgment to take the case out of the statute, Lord Campbell observing "it has been decided that if the admission is coupled with a qualification or condition from which the law cannot infer a promise to pay, that is not sufficient; and where the debtor says, 'I will pay you if you will give me time,' or 'if you will take a composition,' the law cannot infer a promise to pay, because it is inconsistent with what the debtor said. With the exception of *Eicke v. Nokes* (a), which is a *nisi prius* decision, the cases decide that *the law cannot infer a promise from the admission of a debt, where there is a declaration by the debtor at the same time that he is unable to pay it in full.*"

In *Ex parte Topping, re Levey and Robson* (b) the debtor executed an inspectorship deed, by which the creditors engaged not to sue for a period not exceeding three years, but containing a provision by which the inspectors could declare the deed at an end. There was a schedule, setting out the debts, in which L's name was inserted as a creditor. The deed was registered and the debtor verified the schedule by affidavit. L received a dividend. The debtor having become a bankrupt, the inspectors declared the deed to be at an end. The debt was admittedly statute-barred, unless the circumstances were sufficient to take it out of the statute, which, it was held, they were not. Lord Cranworth, after expressing his strong opinion that the deed was no acknowledgment, proceeded. "But then there arose the further question, whether the result would be affected by this, that there was in this case an affidavit

*Ex parte  
Topping,  
re Levey.*

Lord  
Cranworth.

(a) 1 Moo. & R. 359.

(b) 34 L. J. Bkcy. 44.

Lord  
Crauworth.

by the debtor, in which he positively swore that this debt was due? But I think it makes no difference, because the affidavit was only to the effect that the debt was due *modo et formâ*, as therein stated. The debtor swore it was *a debt to be administered under that deed of inspectorship*. . . . An acknowledgment that the whole debt is due is a sufficient acknowledgment within the meaning of the statute, if it be an admission that the whole is immediately recoverable. But the acknowledgment is not sufficient if the admission be *that the debt can only be paid in part or in some qualified mode*. . . . My opinion is that the deed is only the creation of a trust to pay by instalments, and that the affidavit contains an admission of the debt only *modo et formâ*, and hence that there has not been an acknowledgment within the statute" (a).

Semble  
balance of  
authority  
against  
*dictum* in  
*Slater v.*  
*Jones*.

Although, therefore, there has been no express decision on the point arising out of a voluntary composition arrangement, the balance of authority seems to be against the suggestion made by Lord Bramwell in *Slater v. Jones* (b), that it is an implied term in a composition agreement that default shall give rise to a *fresh* cause of action.

Subject to the limitation created by the decision in *Hemp v. Garland* (c) (if sound), a creditor, although barred as to his original debt, may sue on the promise to pay the composition at the least within six years after default (d); but where the agreement to pay the composi-

(a) Cf. *per* Wigram, V.C., in *Philips v. Philips*, 3 Ha. 281, at p. 299.

(b) L. R. 8 Ex. 194, *ante*, p. 64.

(c) 4 Q. B. 519, *ante*, p. 64, n. (b).

(d) It will of course be twenty years if there is a *covenant* for payment of the composition.

tion is with a single creditor and by parol, it is not binding on the debtor (a) (as we have already seen, it is not on the creditor (b) ), and, consequently, if the original debt is barred, the creditor has no further remedy.

(a) *Lynn v. Bruce*, 2 Hy. Bi. 317.

(b) *Ante*, p. 4 *seq.*

## CHAPTER VI.

CASES IN WHICH THE AGREEMENT IS NOT A BAR TO AN ACTION (*continued*).(ii.) *Fraud and Misrepresentation.*(iii.) *Illegality.*(iv.) *Conditional Agreements ; provisoes for avoidance and avoidance generally.*2. *Fraud and Misrepresentation.*

There must  
be strictest  
good faith  
in the  
agreement.

It has been frequently remarked that in a composition agreement the strictest good faith must be observed—it must be *uberrimae fidei* (a)—and, if there has been any fraud or misrepresentation in its inception, the parties entering into it will not be bound thereby, but will be remitted to their original rights.

Misrepresentation  
by debtor  
of his  
assets.

By these agreements creditors consent to forego a portion of their demands, or to give the debtor time, on the assumption that he is unable to discharge all his liabilities at once. Hence every representation, whether by words or conduct, on the debtor's part with regard to his pecuniary position, is a most material element in any such agreement ; and if it has been such as to mislead his creditors, they will not be bound by the agreement into

(a) Cf. *per* Best, C.J., *Britten v. Hughes*, 5 Bing. 460.

which they were thereby induced to enter. Thus in *Monger v. Kett* (a), it was laid down, that "if a debtor, in order to get an abatement from his creditor, makes him believe he is insolvent by absconding, skulking, or shutting up his shop, whereby the latter has just cause to fear the loss of his debt; and thereby procures a release or an abatement, when in truth the man was really solvent, the Court would relieve against such release." It is immaterial whether the debtor misleads his creditors as to the extent of his estate, or knowingly leaves him under a false impression in regard to it, in either case the creditors who have been so induced to agree to forego a portion of their demands, will not be bound by such agreement, or prevented from claiming the whole of their debts (b); *a fortiori*, the creditors will be released from their agreement, where the deed contains a provision for avoiding it, in the event of the debtor not making a full disclosure of his property, and he conceals a portion of it (c).

There is, however, an important fact to be borne in mind with regard to an arrangement by a debtor with his creditors generally, viz., that the consideration to support it proceeds to each creditor from the rest of the creditors, and therefore the failure of a representation made to an individual creditor, and not to the body of the creditors, may not remit that creditor to his original rights. This is well pointed out by Erle, J., in *Mallalieu v. Hodgson* (d). "As, in a composition deed, the principal parties to the stipulation for a release are the creditors, who mutually contract each with the rest of the body,

Misrepresentation must be to the creditors as a body.

Erle, J.

(a) 12 Mod. 558.

(b) *Vine v. Mitchell*, 1 M. & Rob. 337.

(c) *Wenham v. Fowle*, 3 Dowl. P. C. 43.

(d) 16 Q. B. 689, 712.



Erle, J. any misrepresentation of the debtor to any one of the creditors cannot be relied on by that one as the material inducement for his stipulation with the others. The debtor only receives the advantage which the creditors contract with each other to grant to him; the rest of the creditors have made the grant which the plaintiff contracted for; they have been no parties to any fraud; and the plaintiff does not prove the issue that the deed, *which operates between him and them as well as between him and the debtor*, was obtained by fraud, by showing that he was deceived by *the debtor* and would not have executed the deed if he had not been so deceived."

*A fortiori* a creditor cannot claim to be released from his agreement on the ground of misrepresentation where the misrepresentation related to a secret bargain which was itself a fraud on the creditors generally (a).

Representations as to legal effect of instrument.

*Lewis v. Jones.*

It has been held that representations as to the legal effect of the instrument are immaterial, and that, where the agreement purported to be absolute, parol evidence of a representation, that it would be void unless all the creditors signed, was inadmissible, since such representation gave to the agreement a meaning different from that which appeared on the face of it (b).

But individual creditors may take advantage of it.

Secret agreement for preference of single creditor avoids agreement.

Anything, however, that is a fraud on the general body of the creditors can be taken advantage of by any one of the creditors (c). The most common instance of such a fraud is the case where there is a secret arrangement between the debtor and some creditor, who purports to come in under a composition, by which the latter is to

(a) *Mullalieu v. Hodgson*, 16 Q. B. 689.

(b) *Lewis v. Jones*, 4 B. & C. 506.

(c) *Cf. Foley v. Hoare*, Hayes & Jo. 90, where a trust deed, from its provisions and the circumstances of concealment attending it, was held not binding on creditors who had acquiesced in it.

obtain an advantage over the other creditors. The creditors are presumed to have signed the agreement on the understanding that all the creditors should be placed upon the same footing, and therefore any creditor, who has signed on this understanding, will be released from his agreement if it is proved that there was a secret arrangement contravening this implied term in the agreement (a).

But, where it is known to the creditors signing that certain creditors have consented to the agreement only on the condition of having a preference, the presumption that the contract is on the footing of equality of benefit is rebutted, and *cessante ratione cessat ipsa lex* (b).

*Secus*—if known to creditors generally.

Where, at a meeting of the defendant's creditors, all the creditors present, including the plaintiff, signed an agreement in the following terms: "We, the undersigned creditors of W. B., in consideration of 10s. in the pound, &c., hereby agree to accept the same in discharge of our said debts, on the understanding that no concealment or fraud has been practised by the said W. B.: the whole of the creditors receiving not exceeding a like sum in discharge of their debts;" and at the time of the agreement the defendant was being sued by the executor of one of his creditors for a small sum, which he afterwards paid in full the day before the cause was ripe for hearing, it was held that the concluding stipulation of the agreement meant, that no *signatory* should receive a larger dividend than the rest (c).

*Carey v. Barrett.*

Apart from any condition to the contrary in the agree-

(a) *Daughlish v. Tennent*, L. R. 2 Q. B. 49. See as to these secret agreements in fraud of creditors, *infra*, Ch. XIII. pp. 150-165.

(b) *Cf. per Lord Eldon, Juckman v. Mitchell*, 13 Ves. 581.

(c) *Carey v. Barrett*, 4 C. P. D. 379.

ment, or any evidence (if admissible) that the agreement was intended to be conditional on the concurrence of all the creditors, it is clear that payment in full to a creditor who does not purport to come in under the agreement does not avoid the agreement.

### 3. *Where the Agreement is illegal,*

Agreement  
not binding  
if illegal.

“The principle on which an agreement for composition is held to operate as an answer to an action by a creditor who has come into it, is, that there has been a substitution of a new agreement by mutual consent, and on good consideration, in the stead or place of the old contract. . . . The new or substituted agreement must, therefore, of necessity be one which is legal or valid; or the whole ground on which the release of the former contract depends, is destroyed” (a).

Assign-  
ment of  
profits of  
benefice.

*Alchin v.  
Hopkins.*

Accordingly, where the defendant, who was a clergyman, and whose sole income arose from a benefice with a cure of souls, entered into an agreement for composition with his creditors (including the plaintiff) by which—in consideration that his future income should be received by a trustee and (after providing for a curate) should be applied in liquidation of his debts—the creditors agreed not to sue the defendant; and the trustee had received the income, and, after allowing £90 for the performance of the duty, had distributed the residue, with the defendant’s sanction, among the creditors; it was held that the agreement, being void under 13 Eliz. c. 20, was no bar to the plaintiff’s action on the original debt (b).

(a) *Per Tindal, C.J., Alchin v. Hopkins*, 1 Bing. N. C. 99.

(b) *Alchin v. Hopkins, u. s.* So the pay or half pay of a military officer is not legally assignable; *Flarty v. Odium*, 3 T. R. 681. For other property not assignable see Benjamin on Sales, 507 *seq.*

4. *Conditional Agreement—provisoes for avoidance of the agreement—avoidance otherwise.*

We have already seen that a creditor, who has acceded to a composition arrangement, may be released from his undertaking by the breach of an implied condition in the contract (a); *a fortiori* he will not be bound, if the contract is expressly conditional, and the condition has not been fulfilled. For instance, if the agreement is expressed to be conditional on the accession of all the creditors, a creditor will not be bound if all do not accede (b).

Conditional agreement avoided by non-fulfilment of condition.

Any condition, however, to which the agreement is intended to be subject, ought to appear on the face of the agreement, or to be made known to all the creditors. Thus, it has been laid down, that where the deed is on the face of it absolute, parol evidence of the intention of the parties, that it shall be void unless all join, is not admissible. The remarks of Bayley, J., in *Lewis v. Jones* (c), on this point deserve careful attention: "There can be no doubt that an agreement for a composition ought to contain a clause to that effect (i.e. that it shall be void unless all creditors concur), for otherwise the object of the instrument may be defeated; but here there is not any clause in the agreement, or any memorandum attached to the signature of the plaintiff, by which he declares that he signs it upon that condition. If a party, at the time when he signs an instrument, annexes to his signature a condition that the deed is only to have effect against him in case all the creditors sign it, it will be void as to him, unless they do

Condition must appear on face of instrument or be known to creditors generally.

*Lewis v. Jones.*

Bayley, J.

(a) *Ante*, pp. 72, 73.

(b) *Reay v. Richardson*, 2 C. M. & R. 422; *cf.* also *Kesterton v. Sabery*, 2 Chitt. 541.

(c) 4 B. & C. 506, 512.

sign. But if he puts this condition on the face of the instrument, other creditors will not be induced to sign by seeing his signature, except upon the same terms which he has annexed to it; but if a creditor signs such an instrument generally, he becomes a party to it unconditionally, and then the legal effect of the instrument must be collected from the instrument itself, and not from verbal declarations made by the parties at the time when they executed it. On the face of this instrument the plaintiff has not annexed any condition to his signature, and that being so, I think that parol evidence of such a representation was not admissible, and consequently we are not warranted in saying that the instrument was null and void *ab initio*, on the ground that all the creditors have not signed."

Secus: *Re  
Semple.*

If this case stood alone, it would appear clear, that where a creditor signs a composition agreement which is unconditional, and he annexes no condition to his signature, he will not be allowed to allege that his signature was conditional on the concurrence of all the creditors, if it appear that any creditors signed subsequently who were unaware of any such condition; and such a doctrine seems reasonable and in keeping with the decisions generally in regard to composition agreements. In *Re Semple* (a), however, this principle seems to have been disregarded. There, at a meeting of the creditors a letter of licence was proposed, and B, in signing it, said, "Mind, unless all the creditors sign, it is not to be binding," but annexed no condition in writing to his signature. A petition in bankruptcy having afterwards been presented against the debtor by B, an issue was directed "whether

(a) 3 Jo. & La. 488, and see also the early case of *Cooling v. Noyes*, 6 T. R. 263.

the letter of licence was, under the circumstances under which it was signed, a concluded agreement absolute and binding on B at all events," the assignees to be plaintiffs and the bankrupt defendant in the issue. The jury found for the plaintiffs on the issue, but, in reply to two other questions left to them at the trial, found that both at and after the meeting the letter of licence was signed by creditors *to whom the condition stated to have been annexed to his signature by B was not communicated or known*. Under these circumstances Lord St. Leonards declined to hold B bound by the letter of licence, on the ground, that without reference to the particular expressions used by parties in signing the instrument, it might have been executed under such circumstances, as in the event to render it not binding on the parties signing it, viz., that the instrument was in a course of signature, that that course was not completed, and that the instrument was not that which the parties intended; and his Lordship expressed himself satisfied with the finding of the jury, that there had been no concluded agreement (a).

Agreement  
only in  
feri.

In the face of this last case it is difficult to say how far the doctrine enunciated by Bayley, J., in *Lewis v. Jones* (b) would be adopted at the present time, but it is clear, that where there is no evidence of other creditors having been misled, the absolute execution of a deed will not prevent its being treated as an escrow if it was really intended to be such (c).

Where no  
creditors  
misled.

Where the agreement contained a proviso that it should be void unless particular creditors concurred in the arrangement, it was held, that the concurrence of the

Pleading.

(a) Cf. *per* Pollock, C.B., *Boyd v. Hind*, 25 L. J. Ex. 246.

(b) 4 B. & C. 506, *ante*, p. 75.

(c) *Johnson v. Baker*, 4 B. & Ald. 440.

Non-execution not evidence of refusal to execute.

*Holmes v. Love.*

Leaning of Court to uphold conditional deed.

Proviso that all creditors shall execute satisfied by accession.

Proviso that trustees shall execute satisfied by execution of one.

creditors was not a condition precedent, the performance of which the debtor was bound to aver, in setting up the agreement as an answer to an action by one of his creditors (a); and where the deed contained a proviso "that if all and every the creditors whose debts amounted to £5 should refuse to execute or otherwise consent to the deed within six months, the deed should be void," it was held, that the non-execution of the deed by a particular creditor was not evidence of a refusal by him to execute or assent, but that it was incumbent on a party seeking to avoid the deed to show a positive refusal to execute or assent to the deed (b). In fact, where no question arises of fraud on the debtor's part, and he has made no default, the leaning of the Court (if the deed is no longer revocable by the debtor) is strongly in favour of upholding the agreement, in spite of provisions for its avoidance in certain events, unless it is prevented from doing so by the terms of the proviso or the clear intention of the parties.

Thus, a proviso, that if all the creditors do not *execute* within a given time, the deed shall be void, will be satisfied, although the creditors do not *execute*, if they *accede* within the time named, and the deed will be held valid (c). Again, where the debtor made an assignment of his property to four trustees, upon trust to sell, and distribute the proceeds rateably among his creditors who should execute the deed, *provided that* the trustees and the creditors should, on or before a given day, make proof of their debts if required and *execute the deed*; and the deed contained a covenant by the creditors not to sue; the

(a) *Matthews v. Taylor*, 2 M. & Gr. 667.

(b) *Holmes v. Love*, 3 B. & C. 242.

(c) *Spottiswoode v. Stockdale*, Geo. Coop. 105. *Semble* that in this case the time is essential, see *per cur. Oughton v. Trotter*, 2 Nev. & M. 71; but "void" means "voidable," see *infra*, p. 80.

deed having been executed by two only of the trustees, it was held, that it was not thereby void, and that the debt of each of the trustees who executed it was extinguished by his execution (a). Where the trusts of an assignment were, to pay a judgment debt due to A and B, then to pay all the creditors whose debts did not amount to £10 in full, and at the expiration of nine months to pay all the other creditors 5s. in the pound; and the deed contained a covenant by the creditors that they would release their respective claims to the debtor, and a proviso that, in case any creditor whose debt should amount to £100, or any two creditors whose debts should amount to £150, should not execute within three months, the deed should be void, and A and B the judgment creditors (whose debt exceeded £150) did not execute the deed within the time required, it was held, that the deed was not thereby rendered void, the intention being that those creditors only who were to receive a composition under the deed were to execute it (b).

Proviso that all creditors of a certain value shall execute satisfied although secured creditors whose debts are intended to be paid in full do not execute.

*Wells v. Greenhill.*

Although, however, there has been no default on the debtor's part, if it appears from the clear intention of the parties (c), or the express terms of the proviso, that the creditors are to be bound by the arrangement only in a certain event, then they will be discharged from their agreement by proof that the event has not happened. Accordingly, where the plaintiff executed a deed of composition which contained a proviso, that, in case *all the creditors* did not accede to the terms therein arranged within a given time, it was to be void; and one of the

Cases where proviso held not satisfied.

Proviso that all creditors shall accede.

(a) *Small v. Marwood*, 9 B. & C. 300.

(b) *Wells v. Greenhill*, 5 B. & Ald. 869.

(c) *Enderby v. Corder*, 2 C. & P. 203; *Johnson v. Baker*, 4 B. & Ald. 440; *Re Semple*, 3 Jo. & La. 488.



*Spomer v. Whiston.*

Waiver of non-fulfilment of proviso.

*Dunn v. Wyman.*

Proviso that deed shall be "void"—held to mean "voidable."

Parke, B.

creditors refused to execute the deed or accede to the arrangement, but received from the defendant a sum in full satisfaction of his demand, it was held that the plaintiff was not precluded from suing on his original demand (a). But, where there was a similar proviso, and a creditor, who had notice that all the creditors had not executed the deed within the time fixed, had endeavoured to obtain payment of a dividend out of the property assigned, it was held that the deed was *voidable* only, and that he could no longer elect to avoid it (b).

Where it is the debtor himself who is in default, the inducement to uphold the agreement *for his benefit* is taken away, but in such a case the leaning of the Courts is, to construe a proviso, that the deed shall be *void* in the event of the debtor's failure to do a specified act, to mean, not void absolutely, but *voidable* at the election of each creditor as regards himself (c); and it seems that no creditor could elect to treat it as void after taking a benefit under it with notice of the default, though a subsequent default would give the creditor a fresh right of election (d). The reason of the decision was clearly stated by Parke, B. "The material question was whether the deed, in case of a neglect (by the debtor) to effect or keep alive a policy on his own life for £1500, was absolutely *void* as to all the parties, and incapable of being confirmed, or only void as against the plaintiff, if he should so elect. Our opinion is, that the latter is the true construction, by reason of the absurd consequences which would follow if the defendant, against the consent of the

(a) *Spomer v. Whiston*, 8 J. B. Moore, 580.

(b) *Dunn v. Wyman*, 51 L. J. Q. B. 623.

(c) *Hyde v. Watts*, 12 M. & W. 254.

(d) *Ib.*; cf. *Dunn v. Wyman*, *u. s.*; *Watts v. Hyde*, 17 L. J. Chy. 409.

other parties, who had all an interest in the continuance of the indenture, and to whom it gave benefit as well as to the defendant, could avail himself of his own wrong, and absolve himself and the trustees from liability on their respective covenants. We think, therefore, that this case falls within the principle of the numerous authorities cited, and that the indenture was void only as to the plaintiff and others if they should choose to make it so; and it may be that the plaintiff could not, after taking the benefit under the deed, so elect in respect of any prior breach of the proviso or condition."

In *Hyde v. Watts* (a), where these remarks occur, it was held, at law, that the defendant having made default in the duties imposed on him by the agreement, the proviso for the avoidance of the deed came into operation, and the plaintiff could elect to avoid the deed. But, in Equity (b),—it appearing that there had been a secret agreement between Hyde and Watts, by which Hyde bargained to receive payment of his debt in full, and that Hyde, who had acted as solicitor to Watts in the preparation of the deed, had not explained that the release was binding on him (Hyde) notwithstanding such agreement, and that he might be remitted to his original rights by Watts' default in performing the stipulations contained in the deed—Knight Bruce, V.C., held that Hyde could not be allowed to take advantage of the debtor's default, which would be tantamount to taking advantage of his own wrong, and restrained him from proceeding with his action at law.

*Hyde v.  
Watts.*

Solicitor  
neglecting  
duty to-  
wards  
client not  
allowed to  
enforce  
proviso for  
avoidance.

*Watts v.  
Hyde.*

(a) 12 M. & W. 264.

(b) *Sub nom. Watts v. Hyde*, 2 Coll. C. C. 368.

'Void'  
means  
'voidable.'  
*Hughes v.*  
*Palmer.*

The same construction, namely, that 'void' means 'voidable,' was put upon a similar proviso in *Hughes v. Palmer* (a). A composition deed was executed, by which the debtor, T. H. P., and the defendants jointly and severally covenanted to pay to the plaintiff, as trustee for the creditors, a composition on T. H. P.'s debts by three instalments, and the creditors released their debts, subject, however, to a proviso that in case default should be made in the payment of any of the instalments, or in case, before the composition should be fully paid to the plaintiff, the debtor should be adjudicated bankrupt, or make or attempt to make any assignment of his estate for the benefit of his creditors, or any different arrangement with them, "then these presents, and the release, and every other clause and provision herein contained, shall be thenceforth at an end and void," and the creditors should be at liberty to sue for their debts, less what they had received for them under the deed or otherwise. After payment of the first instalment the debtor became bankrupt on his own petition. The second instalment having become due, the defendants refused to pay it, on the ground, that by the bankruptcy the proviso came into operation and they were discharged from their covenant. The trustee brought this action for the second instalment. None of the creditors had elected to treat the deed as void, nor had any of them proved under the bankruptcy, and after the adjudication they met and resolved that they would not treat the deed as void against the sureties, but would hold them jointly and severally liable to pay the balance of the composition. It was held by the Court (Willes, Byles, and Keating, JJ.) that the

(a) 19 C. B. (N.S.) 393.

defendants could not avail themselves of the proviso as a defence, and that the deed was not void, but voidable only at the election of the creditors (a).

It should be observed that a creditor may be remitted to his original rights by a subsequent material alteration of the deed. Thus in *Fazakerly v. M'Knight* (b) there had been in October, 1854, an account stated between the plaintiff and the defendants which shewed that the defendants were indebted to the plaintiff in the sum of £337 1s. 10d., and the defendants accordingly accepted a bill at six months, drawn on them by the plaintiff, and payable to his order. Subsequently, the defendants supplied goods to the plaintiff to the amount of £142 9s. 7d. In January, 1855, the defendants were in difficulties, and entered into an arrangement for payment of a composition of 10s. in the pound, and a deed was executed which was to operate as a release as against any creditor suing. At the time the plaintiff executed the deed, a blank for the amount of his debt was left in the schedule; this blank was subsequently filled up, without the plaintiff's authority, by the insertion of the sum of £337 1s. 10d. The plaintiff sued on the bill giving credit for the sum of £142 9s. 7d., and relied on the avoidance of the deed by the unauthorized alteration. The jury having found that the intention of all parties was, that the release should operate only on the balance of the debt due to the plaintiff, after deducting the sum due from him, and a verdict having been given for the plaintiff for £200, the Court discharged a rule

Avoidance  
of deed by  
material  
alteration  
—unautho-  
rised filling  
up of blank.

*Fazakerly*  
*v.*  
*M'Knight.*

(a) That the guarantor of a composition by a separate instrument will still remain liable, when the creditors are remitted to their original rights by reason of default, see *Glegg v. Gilbey*, 2 Q. B. D. 6, and 2 Q. B. Div. 209.

(b) 6 E. & B. 795.

to enter a verdict for the defendants, holding that the unauthorized alteration of the deed contrary to the intention of the parties avoided it (a).

*Secus:*  
authorized  
alteration.

*Hudson v.*  
*Revett.*

But, where in the deed, when executed, there was a blank opposite the name of one of the creditors, *which it was intended* should be filled up by the insertion of the amount due to him (which had then not been ascertained), and the amount was inserted on the following day *in the presence of the debtor and creditor*, the Court held that the deed was not invalidated thereby (b).

Immaterial  
alteration.

*West v.*  
*Steward.*

And so, where the plaintiff executed an assignment for the benefit of his creditors, which purported to be between the plaintiff of the first part, the trustees of the second part, and "the several other persons whose names and the amounts of whose debts were set out in a schedule thereunto annexed, being creditors of the plaintiff" of the third part, and there was no schedule to the deed at the time of its being executed by the plaintiff, but at the time of its production it had a schedule annexed, consisting of the signatures of the creditors themselves, some of which had been erased, and others had no sums set against them, the Court held that the deed was not avoided thereby, *so as to prevent the property passing to the trustees by the assignment*, though it would have been otherwise if the schedule had been referred to to show *what passed by the deed* (c).

(a) See also *Hibblethwaite v. McMorine*, 6 M. & W. 200.

(b) *Hudson v. Revett*, 5 Bing. 368.

(c) *West v. Steward*, 14 M. & W. 47.

## CHAPTER VII.

### THE AMOUNT AND NATURE OF THE DEBT IN RESPECT OF WHICH A CREDITOR IS TAKEN TO HAVE ACCEDED.

WHEN a creditor has acceded to an arrangement, a question sometimes arises whether he is to be taken to have acceded in respect of the whole of his debt or of a portion only.

We will consider, in the first instance, the cases in which the amount of the debt, in respect of which the creditor accedes, is specified in the agreement. Although the debt be thus specified, the creditor will be taken to have acceded in respect of *all* debts owing to him (a).

Although amount of debt inserted in agreement, creditor bound as to all debts.

In *Holmer v. Viner* (b) the defendant executed an assignment of his property for the benefit of his creditors at large. The plaintiff was appointed one of the trustees, and the deed was executed by the rest of the creditors. At the time of executing the deed, the plaintiff held two acceptances of the defendant, which had then nine months to run, and the defendant was also indebted to him in the sum of £81 for goods sold. The plaintiff claimed for neither of the acceptances under the deed, but signed only as a creditor for the £81. Two years later the

*Holmer v. Viner.*

(a) But see *Payler v. Homersham*, 4 M. & S. 423 (*infra*, p. 86), and the exceptions, *post*, p. 91 *seq.*

(b) 1 Esp. 132.

Creditors  
cannot  
split their  
demands.

drawer of the bills became bankrupt, and the plaintiff then sued the defendant, but his action was dismissed, Lord Kenyon holding "that it was not to be allowed that a party, having several demands against an insolvent person, should split those demands and come in under the composition-deed for part, and sue for the remainder at a subsequent time—that such would be a fraud upon the other creditors," a ruling which was upheld by the Court of King's Bench.

Conceal-  
ment of  
part of debt  
at debtor's  
suggestion.

*Eastabrook  
v. Scott.*

So again, where the defendants, who were creditors of the debtor for the sum of £3431 15s. 9d., in acceding to a composition agreement, *at the debtor's suggestion* understated their debt at £1531 16s. 0d., but, under a private agreement, received promissory notes for the composition on the *whole* of their debt and bonds for the balance; on a bill being filed by the debtor and a creditor, for delivery up of the bonds and return of the composition paid on the difference between the *scheduled* debt and the *actual* debt, Lord Alvanley, M.R., ordered the bonds to be delivered up, and held that until all the creditors were satisfied the defendants could not receive anything beyond a dividend on their *scheduled* debt, but reserved the question whether as against the debtor they might thereafter be entitled to a dividend on the balance of their debt (a).

Secus:  
*Payler v.  
Homersham.*

Release  
restricted  
by recital.

In *Payler v. Homersham* (b), however, where the deed contained a recital, that the defendant stood indebted to his creditors in the several sums set to their respective names, which was followed by a general release, it was held that the release was restricted by the recital, and the plaintiff, who had executed the deed, was allowed to sue

(a) *Eastabrook v. Scott*, 3 Ves. 456.

(b) 4 M. & S. 423. See also *Read v. Wrouth*, 9 L. J. (N.S.) Q. B. 4; *infra*, p. 88.

on a bond, the amount of which was not included in the sum set against his name; but this case only established that a general release may be restricted by a particular recital, and the question was not argued on the ground of public policy.

Due prominence was given to this last view of the question in *Britten v. Hughes* (a). Here the plaintiff, who held two bills drawn by the defendant, one for £400 and the other for £156 19s. 10d., executed a composition agreement, containing a general release to the defendant and also a schedule, in which was set out the amount owing respectively to the creditors executing. *At the request of the defendant* (who expected that the acceptor would pay the bill for £400), the sum of £156 19s. 10d. only was put opposite the plaintiff's name in the schedule, but the other creditors were not aware that the plaintiff held the bill for £400. On his subsequently bringing an action on this last-mentioned bill, it was held by the Court of Common Pleas (Best, C.J., Park and Burrough, JJ., *dissentiente* Gaselee, J.), that he could not sue upon it. Best, C.J., after commenting on the authorities, said: "Without the authority of cases the principle is clear that, upon a composition-deed, all the parties are supposed to stand in the same situation, and if there is any one of them who refuses to do so, he must announce it at the time. The plaintiff here says he will take 10s. in the pound; the others probably esteem it useless to stand out after that; and if they suppose the plaintiff signs for the whole of his demand, when such is not the fact, they are not in a condition to form a correct judgment on the subject. Independently, therefore, of the terms of this deed, if we decide in favour of the plaintiff's

General release not restricted to debts specified.

*Britten v. Hughes.*

Best, C.J.

(a) 5 Bing. 460.



Best, C.J. claim, we should establish a rule which would lead to great fraud in the execution of composition-deeds . . . If reservations like this be allowed, no man again will agree to a deed of composition. Such transactions are necessarily *uberrimae fidei*, and no engagement can stand which has been withheld from the knowledge of the whole body of the creditors, and which it would have been material for them to know" (a).

Creditors  
not bound  
as to bills  
previously  
indorsed  
away.

*Margetson*  
*v. Aitken.*

So, in *Margetson v. Aitken* (b), where the plaintiff, as indorsee, sued the defendant as indorser of three bills of exchange, and the defence was that after the bills had been given, but before two of them became due, the defendant had compounded with his creditors and the plaintiff had executed the composition-deed, his debt being stated at £27, which did not include any of the bills. It appeared that, at the time of the composition, the bills which had not become due were not in the plaintiff's hands, having been indorsed over by her; Lord Tenterden held that the plaintiff was barred as to the bill she then held, but not as to those that were outstanding (c).

*Read v.*  
*Wrou.*

Release  
restricted  
to debts  
recited.

But in *Read v. Wrou* (d) the plaintiff was the holder of a promissory note of R. W. for £536, and also of a joint and several promissory note of R. W. and F. W. for £1000. R. W., by deed reciting that he was indebted to the creditors, parties thereto, "in the sums set against their respective names," assigned his personal property to trustees for the benefit of his creditors, and the creditors purported to release him in general terms. The plaintiff

(a) *Cf. per* Martin, B., in *Teed v. Johnson*, 11 Ex. 842, 846.

(b) 3 C. & P. 338 (*nisi prius*).

(c) *Cf. Seager v. Billington*, 5 C. & P. 456; but see *Hancock v. Clay*, 2 Stark. 100.

(d) 9 L. J. (N.S.) Q. B. 4.

executed the deed, and the sum of £536 was set against his name. It was held that the release was restricted by the recital, and did not prevent the plaintiff from suing the two makers on the note for £1000, the Court holding there could have been no fraud on other creditors (a).

Since a creditor who accedes in respect of a debt of a *specified* amount is taken to have released *all* claims against the debtor, unless an agreement to the contrary was known to the other creditors, it follows *a fortiori*, that where a creditor signs *without specifying the amount of his debt* he releases his whole demand.

*A fortiori* creditor is bound as to all debts where amount of debt is not specified.

Thus, where the plaintiff, who had a claim against the defendant on a promissory note, of which the defendant was maker, and also for goods sold, executed a composition-deed but declined to set the amount of his debt opposite his name, saying he expected the note (which was not then due) to be paid, he was held bound by the composition to the amount of his whole debt, and on his bringing an action on the note he was nonsuited, and a rule to set aside the nonsuit was refused (b).

*Harry v. Wall.*

The converse of this is also true, namely, that where the creditor executes the deed leaving the amount of his debt blank he is-entitled to a dividend on the whole of his debt (c); and where there was a covenant by the trustee to pay the composition to the creditors "upon the debts set opposite their respective names in the schedule," it was held, that a creditor, against whose name no sum was put, but of the amount of whose debt the trustee had notice, could sue the trustee on the covenant (d). In *Graham v.*

Conversely creditor acceding without limit entitled to dividend on whole of his debt.

Whether amount of debt ascertained or not.

(a) See further *Blackstone v. Wilson*, 26 L. J. Ex. 229.

(b) *Harry v. Wall*, 1 B. & Ald. 103.

(c) *Graham v. Ackroyd*, 10 Ha. 201.

(d) *Daniel v. Saunders*, 2 Chitt. 564.

Graham v.  
Ackroyd.

*Ackroyd* (a) the plaintiffs were creditors of Rawson for an ascertained sum of £1974, and also on acceptances given by them to Rawson, on goods shipped by him through them as his factors on a *del credere* commission. Rawson executed an inspectorship deed, which contained a recital that he was indebted to the creditors parties thereto in the several sums set opposite their respective names, and by which he covenanted to assign his property to the defendants as inspectors for rateable distribution among his creditors, and the creditors covenanted not to arrest or impede him. At this time several of the acceptances were still undue, and the goods in respect of which they were given remained unsold. The plaintiffs gave the defendants notice of their ascertained debt, adding that this was quite independent of what might be due to them on the general account, which they could not estimate until the goods were nearly all sold, and they insisted on being at once admitted as creditors for £1974 and receiving a dividend thereon. The defendants accordingly admitted their claim to that extent, and the deed was sent for the purpose of being executed by the plaintiffs (as was alleged by the defendants) in respect of the £1974 only. The plaintiffs executed the deed generally, and returned the deed, claiming to have a dividend reserved on their unascertained debt. The dividends were paid to the plaintiffs in respect of their admitted claim. The plaintiffs' claim on the balance of accounts was gradually reduced, by remittances from the foreign houses of the proceeds of the goods which had been sold, and when all the goods had been sold, the plaintiffs, giving credit for the proceeds, claimed to be admitted as creditors for a balance of £5348, and to receive dividends thereon.

(a) 10 Ha. 192.

Turner, V.C., held, that the plaintiffs having executed the deed without limit were entitled to all the rights incident to such execution until it was set aside (a); and that the plaintiffs were none the less entitled to the dividend on the balance of the account, because the amount was not ascertained, the question being, not whether the debts were intended to be specified in the schedule, but whether the provisions of the deed were intended to extend only to debts, the amount of which was so specified; which he thought was not the case.

There are, however, some exceptions to the rule that a creditor who accedes to a composition agreement is taken to have acceded in respect of all claims.

First, he will not be held to have released a claim of which (though it existed at the time) he was then ignorant and which he could not have contemplated releasing. Accordingly, where the plaintiffs brought an action for the wrongful conversion of certain indigo warrants, and the defendants pleaded a release executed by the plaintiffs subsequently to the acts complained of, a replication that the plaintiffs, at the time of the execution of the release, were ignorant of the defendants' wrongful acts, and executed the release intending it to extend only to a debt due from the defendants to them, was held a sufficient answer to the release (b).

Secondly, where a person who accedes to the arrangement has two debts owing to him, one in his individual capacity and the other as a member of a partnership, it seems that in the absence of evidence to the contrary he will be taken to have released only his private debt (c).

*Exceptions.*

1. Creditor will not be taken to have acceded in respect of claim of which he was ignorant.

*Lyall v. Edwards.*

2. Partnership and private debt.

(a) *Cf. Lancaster v. Elce*, 31 Beav. 328; and see *post*, p. 169.

(b) *Lyall v. Edwards*, 30 L. J. Ex. 193.

(c) *Bain v. Cooper*, 9 M. & W. 701, *per* Lord Abinger, C.B., p. 707, and *cf. Ex parte Kirk*, 5 Chy. Div. 800.

*Lanyon v.  
Davey.*

A case almost the converse of the preceding, though closely akin to it in principle, is to be found in *Lanyon v. Davey* (a). The plaintiff in that case was the purser of a mine, in which the defendants held shares. Funds being required for carrying on the mine, it was suggested at a meeting of the shareholders, that the shareholders should give the plaintiff a promissory note for £600, by the deposit of which he should obtain the necessary funds. Two shareholders refused to sign the note, but the defendants did so. The plaintiff raised money on the note and applied the proceeds in paying the workmen. Subsequently, a meeting of the shareholders and creditors of the mine was held, at which it was resolved that an assignment of the mine should be made in order to sell it and pay the debts. The plaintiff claimed to come in as a creditor in respect of the "moneys borrowed to pay the workmen, which he had raised on his notes of hand." Some objection was made to this claim on the ground that this was not a debt due from the whole body of the adventurers but only those who had signed the note; but this objection was waived, and the plaintiff executed the deed. The deed was expressed to be between all the adventurers of the first part and the several persons whose names were thereunto subscribed "as creditors of the several other persons thereinbefore described of the first part as adventurers, for supplies to and debts incurred by them for or in respect of the same mine, to the amounts set opposite their respective names" of the second part, and after reciting that the shareholders had, in the prosecution of the mine, incurred debts thereon, with the persons parties thereto of the second part, the mine was thereby con-

(a) 11 M. & W. 218.

veyed in trust for those creditors, and it was provided that *no action should be brought by any of the persons, parties thereto of the second part, against all, any, or either of the persons, parties thereto of the first part, for the recovery of any debts due or owing upon the said mine, or in anywise relative thereto*, and that if any such action was brought the deed might be pleaded as a release. The amount of the note and interest thereon was placed against the plaintiff's signature. The plaintiff having brought an action against the defendants as makers of the note, they pleaded the deed as a release, averring that the plaintiff signed it as a creditor of the parties thereto of the first part in respect of the note, an averment which was traversed by the replication. The Court (Parke, Alderson, Gurney, and Rolfe, BB.) held that the plaintiff must be taken to have signed the deed in respect of his claim for the advance of the money raised upon the note, and not in respect of his claim upon the note itself. Parke, B., observed, in his judgment, "The plaintiff had an undoubted claim upon the note against the seven persons who signed it, but against no others : he had also a claim against all the shareholders for the money advanced by him for their use, to pay the workmen, if they all had, either expressly or impliedly, sanctioned that advance : and his claim at this meeting was evidently based upon the latter right. It is said, however, that he executed the deed as a creditor in respect of the note : but the whole frame of the deed excludes such a supposition, while it is altogether consistent with the idea that it was executed in respect of the money lent. Standing in the condition I have mentioned, he must have signed the deed for the debt which he would have against all, if all authorized it, not for the note, on which he could not possibly

Parke, B.

Parke, B. have any remedy except against the parties who made it. The deed admits nobody to sign but those who are creditors of *all the adventurers*; we must therefore take it that the plaintiff signed for the debt of all. *Whether his remedy on the note fails in consequence, or is reserved to him, is no question on these pleadings."*

## CHAPTER VIII.

### HOW FAR ASSIGNMENTS FOR THE BENEFIT OF CREDITORS ARE REVOCABLE; AND THE RIGHT OF CREDITORS TO ENFORCE THEM.

IT has been established by a long train of decisions that an assignment of property to trustees for the payment of debts of the assignor, *without the knowledge or concurrence of the creditors*, is a revocable direction by the assignor as to the mode in which he wishes his own property to be applied for his own benefit, and that the creditors named are not constituted *cestuis que trustent*, and cannot claim to have the trusts of the assignment executed, either against the debtor himself or the trustee (a).

Assignments for benefit of creditors made without their knowledge or concurrence revocable.

The principle underlying the decisions is clearly stated by Lord Cranworth in *Synnot v. Simpson* (b). "They proceeded on the principle that, where a person who is indebted makes provision for payment of his debts by vesting property in trustees for the purpose of discharging them, but does so behind the backs of the creditors and without communicating with them, the trustees do not become trustees for the creditors. The arrangement is

Principle of this doctrine.

Lord Cranworth.

(a) *Walwyn v. Coutts*, 3 Mer. 707, and *per* Sir C. Pepys, M.R., in *Bill v. Cureton*, 2 My. & K. 509; *Gibbs v. Glamis*, 11 Sim. 584; *Johns v. James*, 8 Chy. Div. 744.

(b) 5 H. L. C. 121, at p. 133.



Lord Cran-  
worth.

one supposed to be made by the debtor for his own convenience only; it is as if he had put a sum of money into the hands of an agent with directions to apply it in paying certain specified debts. In such a case there is no privity between the agent and the creditor. The debtor may at any time revoke the authority given to his agent, and may recall the money placed in his hands. The agent is the agent exclusively of the debtor, not of the creditor. No action could be maintained against him by the creditor; there is no privity between them. The same principle precisely applies, where the debtor, instead of placing money in the hands of another, with directions to apply it in discharge of his debts, conveys real estate to him in order to its being converted into money by sale or mortgage, so that the money raised may be applied in discharge of debts. The person in whom real estate is so vested is a trustee, not for the creditor, but for the debtor. When, in pursuance of his trust, the trustee sells and pays the creditor his demand, he does so in pursuance of the directions given him by his principal, the debtor, from whom he has received the property—not in discharge of any duty which he owes to the creditor; the debtor is alone the person to whom the trustee is to look. The debtor may regulate the disposition of the property as he thinks fit; may order the proceeds of it to be applied in discharge of his debts, and may then revoke these orders, and give fresh directions, without regard to the interests of those for whose benefit the prior orders would have operated" (a).

*Garrard v.*  
*Lord*  
*Lauder-*  
*dale.*

Thus, in *Garrard v. Lord Lauderdale* (b), property was

(a) Cf. per Sir J. Leach, M.R., *Acton v. Woodgate*, 2 My. & K. 495.

(b) 3 Sim. 1.; affirmed on appeal by Lord Brougham, 2 Russ. & My. 451.

assigned to trustees by a deed, to which certain scheduled creditors were expressed to be parties; they, however, neither executed it, nor were privy to its execution. Shadwell, V.C., held that one of the scheduled creditors could not enforce the execution of the trusts of the deed—a decision which was upheld, on appeal, by Lord Brougham.

Creditor not privy to assignment cannot claim execution of trust.

So, in the recent case of *Johns v. James* (a), a debtor had conveyed all his property to the defendants, upon trust to pay a debt due to themselves and all other debts due from the assignor, including a debt due to the plaintiff, and the defendants had realised the property, and alleged that they had expended the whole of the proceeds in discharge of some of the assignor's debts, but had paid nothing to the plaintiff; the plaintiff having brought an action, for an account and the execution of the trusts of the deed, including payment of his own debt, but not having alleged in his statement of claim that the assignment had been communicated to him, it was held that a demurrer to this claim must be allowed.

Demurrer allowed.

*Johns v. James.*

In *Garrard v. Lord Lauderdale* (b) the Vice-Chancellor in his judgment intimated that, if the execution of the deed had been communicated to the creditors (which was disputed), this would make no difference. This proposition, that a communication to the creditors of the existence of such a trust, would not defeat the power of revocation by the debtors, was considered by Sir John Leach, M.R. (c), who observed thereon: "It appears to me that this doctrine is questionable, because the creditors, being aware of such a trust, might be thereby induced to a forbearance in respect of their

*Secus:* where trust communicated to creditors.

(a) 8 Chy. Div. 744.

(b) 3 Sim. 1, at pp. 12, 13.

(c) *Acton v. Woodgate*, 2 My. & K. 495.

Lord St.  
Leonards.

claims which they would not otherwise have exercised." The same view was taken by Lord St. Leonards in *Browne v. Cavendish* (a), who said: "I do not mean to bind myself to hold that, in every case, a representation to a creditor will give him the benefit of the trust. It must depend on the character of the representation and the manner it is acted on. On the other hand, I should be sorry to have it understood, that a man may create a trust for the benefit of his creditors, communicate it to them, and obtain from them the benefit of their lying by until perhaps the legal right to sue was lost (b), and then insist that the trust was wholly within his own power." The question is now settled in favour of the view maintained in these last two cases, and the present law is well stated by Lord Cranworth in *Synnot v. Simpson* (c):—"The case is obviously different when the creditor is a party to the arrangement; the presumption then is that the deed was intended to create a trust in his favour, which he therefore is entitled to call on the trustee to execute. So, even though he be not made a party, if the debtor has given him notice of the existence of the deed, and has expressly or impliedly told him that he may look to the trust property for payment of his demand, the creditor may thereby become a *cestui que trust*, and may acquire a right as such, just as if he had been a party and had executed the deed" (d).

Lord Cran-  
worth.

A communication *by the trustee* to the creditor may

(a) 1 J. & La. 635. Cf. the remarks of Wigram, V.C., *Kirwan v. Daniel*, 5 Ha. 499, and *per* Turner, V.C., in *O'Brien v. Osborn*, 16 Jur. 960.

(b) See *Nicholson v. Tutin*, 2 K. & J. 18, *ante*, p. 13.

(c) 5 H. L. C. 121, 138.

(d) See also Lord Cranworth's remarks in *Mackinnon v. Stewart*, 1 Sim. (N.S.) 89.

render the deed irrevocable. Thus, where a debtor executed a deed of assignment of all his property to a trustee (who was not a creditor) in trust for such of his creditors as should come in and execute the deed, and one of the creditors, after an agent for the trustee had taken possession, applied to the agent for an explanation, and, upon receiving one, expressed himself satisfied, and took no step to obtain payment of his debt, either under the assignment or independently of it, it was held, that what had taken place was sufficient to constitute the creditor a *cestui que trust*, and that the deed thereupon ceased to be revocable (a). But in *Cornthwaite v. Frith* (b), S., on going abroad, assigned property to F. upon trust for realisation and collection, and for payment of his debts (giving F. large discretionary powers), and for payment over of the surplus to S. The plaintiff, who claimed to be a creditor of S., was referred by him to F., and some correspondence ensued between the plaintiff and F. in relation to his claim, but it was held that there had been no such communication by F. to the plaintiff as would constitute the latter a *cestui que trust*. Knight Bruce, V.C., in giving judgment, pointed out that by the deed nothing more was effected than the creation of a general agency, and, that there had been no act or conduct on the part of S. which could have converted the instrument into a deed of trust in favour of creditors; he doubted whether by reason of any conduct of F., independently of S., the property comprised in the document could become liable to the claims of creditors; but, without deciding that, he held, on the facts, that nothing which had taken place had given the plaintiff an interest. The result of this case

Communication by trustee to creditor may render the deed irrevocable.

*Harland v. Binks.*

*Cornthwaite v. Frith.*

(a) *Harland v. Binks*, 15 Q. B. (N.S.) 713.

(b) 4 De G. & Sm. 552.

Character of communication by trustee necessary to render deed irrevocable.

seems to be, that, in order to constitute a creditor a *cestui que trust*, and to render the deed irrevocable, the communication made by the trustee to the creditor must be such as amounts to an agreement, by the party directed to pay with the creditor, that he will pay him, or a representation, that he holds the money as agent or trustee for the creditor. The doubt suggested, as to the power of the *agent* to constitute a creditor a *cestui que trust*, seems groundless, for, as between the agent and the creditor, if the agent had made such a representation, and it had been acted on by the creditor, the agent would be estopped from disputing the truth of his representation; and, as between the agent and the debtor, if the agent had so far acted on the directions given him, as to render him liable to the creditor, the debtor would not be allowed to recall or vary his directions to the prejudice of the agent (a).

Creditor a party in another character.

*Montefiore v. Browne.*

Where A. and B., father and son, executed deeds for the conveyance of some of their family estates to trustees, for sale and for payment of the debts of A. (including *inter alia* a debt due to D. as trustee for an infirmity), and D. (who had some legal interest in the estates) was a party to the conveyance and executed it, it was held, that the trust, in favour of D. and the infirmity, was irrevocable; and the House of Lords declined to regard D.'s execution as merely that of a necessary conveying party, especially having regard to the fact, that he had not entered up judgment on a warrant of attorney, which had been given him, at the time of the execution of the conveyance, in substitution for two earlier warrants of attorney on which he had entered up judgment (b).

(a) And see *per* Kindersley, V.C., *Lawrence v. Campbell*, 7 W. R. 170.

(b) *Montefiore v. Browne*, 7 H. L. C. 241.

Where the deed has become irrevocable as to creditors by their execution of it or its communication to them, so as to render them *cestuis que trustent*, they of course have the ordinary right of *cestuis que trustent* to enforce the execution of the trust (a). Where, however, the deed has become irrevocable by other circumstances, there seems no reason, why any shifting right of the owners, as between themselves, should give the creditors a claim, which the law denied them at the inception of the trust (b).

Creditors may enforce trust if irrevocable through communication.

A curious case, in which the creditors, parties to an assignment, were held entitled to enforce the execution of the trust, almost contrary to the terms of the instrument creating it, is found in *Cosser v. Radford* (c). The debtor, W. H., assigned property to the defendant as trustee, upon trust for sale and (*inter alia*) payment of debts due to certain creditors, parties to the deed, and other creditors who might execute it; "yet so, nevertheless, that the trustee should have full discretionary power and authority to apply the said moneys, or any part thereof, from time to time in paying or satisfying either wholly or partially any one or more of the said creditors the amount of his debt in preference or priority to any other or others of the said creditors." There was a trust of the ultimate surplus for W. H., and it was declared "that nothing therein contained should operate to subject charge or make liable the premises thereby assigned to or with any debt the payment

*Semhle*, that right of c. q. t. to enforce execution of trust cannot be excluded.

*Cosser v. Radford.*

(a) *Per* Lord Cranworth, *Synnot v. Simpson*, 5 H. L. C. 139, quoted *ante*, p. 98.

(b) See and compare *Gibbs v. Glamis*, 11 Sim. 584, and the judgment of Lord St. Leonards in *Synnot v. Simpson*, *u. s.*, p. 121, with the judgment of Lord Cranworth, *ib.*

(c) 1 De G. J. & S. 585.

whereof was intended to be thereby provided for, or to give the person to whom any such debt was owing (other than certain incumbrancers) any right of action or suit, or any lien charge or demand, on account of such debt upon or against the said premises respectively, or the said W. H. or the defendant, or the trustee for the time being." The deed was executed by the trustee, two incumbrancers, and four simple contract debtors; of whom the plaintiff was one, and the plaintiff subsequently received from the trustee a payment on account of his debt. A bill filed by the plaintiff, on behalf of himself and all other creditors entitled to the benefit of the deed, for accounts and the execution of the trusts, was dismissed by Page Wood, V.C., but on appeal a decree was made, the Court (Knight Bruce, and Turner, L.JJ.) holding, that the trustee had not, on the true construction of the instrument, a power of excluding, but only of preferring, and that the declaration was not intended to deprive the parties of all remedy against the trustee for breach of trust, but that the deed should not give the creditors any new right against the trustee or the debtor personally.

Assign-  
ment  
though  
irrevocable  
as to one  
creditor  
may be  
revocable  
as to  
others.

*Acton v.*  
*Woodgate.*

In *Griffith v. Ricketts* (a) the question was raised, but not decided, whether, when a conveyance for the benefit of creditors has become irrevocable as against particular creditors, by reason of its having been communicated to them, it can still be revoked as to the surplus after satisfying such creditors. This question had been answered in the affirmative, by anticipation, in *Acton v. Woodgate* (b); for, in that case, there was a trust deed in favour of all the creditors (including certain *post obit* creditors) of which the defendants (*who were creditors*) were trustees, and the

(a) 7 Ha. 307.

(b) 2 My. & K. 492.

settlor afterwards by a second deed directed the trustees to exclude the *post obit* creditors, which the Court held he was entitled to do. This, as was pointed out in *Johns v. James* (a), was not, strictly speaking, a revocation of the first deed. "You cannot revoke the deed and get the money out of the hands of the trustee until, at all events, you have satisfied all the charges and expenses he has incurred, and any right he has acquired in the property (b). It is not a revocation of the deed, but it is a revocation of the directions given by the deed to the assignor's agent as to what he shall do with the proceeds" (c). These remarks should be borne in mind in considering the case of *Siggers v. Evans* (d), where it is laid down broadly, that where the trustee, to whom an assignment for the benefit of creditors is made, is himself a creditor, the assignment is not revocable after it has been communicated to him. In that case the question was simply, "whether, where the trustee to whom the property was conveyed, and in whom the legal right to the property was vested, was himself a *cestui que trust*, or a person interested in the deed, an execution creditor was entitled under those circumstances to say, that the whole thing was void as being a violation of the statute 13 Eliz., that there was no property conveyed to the trustee at all, and that therefore the execution creditor could take the property" (e).

Meaning of expression that deed is revocable.

James, L.J.

*Siggers v. Evans.*

James, L.J.

Since the decision of the case of *Johns v. James* (f), in which the trustee was a creditor, the question must be

(a) 8 Chy. Div. 744.

(b) *Cf. Wilding v. Richards*, 1 Coll. 655.

(c) *Per James, L.J.*, 8 Chy. Div. 751.

(d) 5 E. & B. 367. See *post*, p. 110.

(e) *Per James, L.J.*, 8 Chy. Div. 751.

(f) 8 Chy. Div., 744, *ante*, p. 97.



regarded as finally decided in favour of the debtor's power to revoke the trusts, except as to such creditors as have by execution or communication become *cestuis que trustent*.

Convey-  
ance  
although  
revocable  
operates to  
pass the  
property  
until re-  
voked.

It should be observed, that although the conveyance may be revocable until it has been executed by, or communicated to, creditors, yet until it has been revoked, it operates to pass the property to the assignee, who can recover the property from third persons without making his *cestuis que trustent* (whether the settlor or creditors) parties (a).

Where  
trustee is  
himself a  
creditor,  
property  
vests  
before  
assent.

Where the trustee, to whom an assignment for the benefit of creditors is made, is himself a creditor and the assignment is communicated to him, and he does not disclaim, the title vests in him before any actual assent expressed by him to take the property and accept the duties of the trust (b).

Where  
trusts  
executed  
by the  
Court  
decree  
limited to  
persons  
entitled to  
benefit of  
the trust.

It follows from the light in which trusts for the benefit of creditors are regarded, that where the Court orders the execution of the trusts of a deed, which purports to be for the benefit of *all* the settlor's creditors, the decree is made for the benefit not of "the plaintiff and all other creditors of the settlor," but of the "plaintiff and all other the creditors of the settlor entitled to the benefit of the deed" (c). And in one case, where, on the hearing, an inquiry was directed as to all the creditors of the settlor at the date of the execution of the deed, and creditors accordingly proved their claims under the decree, nevertheless, on further con-

(a) *Glegg v. Rees*, 7 Chy. 71.

(b) *Siggers v. Evans*, 5 E. & B. 367; and *Hobson v. Thelluson*, L. R. 2 Q. B. 642. See *post*, p. 110.

(c) *Per James, L.J.*, 8 Chy. Div. 752; and see *Squire v. Ford*, 9 Ha. 47.

sideration, those creditors only who were entitled to the benefit of the trust were allowed to participate in the distribution of the fund (a).

It was formerly held that to a bill filed for carrying the trusts of a creditors' deed into execution, the scheduled creditors, who had not executed the deed, need not be parties, but that those who had executed ought to be (b). But now by R. S. C., Ord. XVI., r. 9, where there are numerous persons having the same interest in one cause or matter one or more of such persons may sue on behalf or for the benefit of all persons so interested; and by R. S. C., Ord. XVI., r. 36, any one of several *cestuis que trust* under any deed or instrument entitled to a judgment or order for the execution of the trusts of the instrument, may have the same without serving any other *cestuis que trust*.

Parties to an action for the execution of trusts of creditors' deed.

R. S. C. Ord. XVI. r. 9.

R. S. C. Ord. XVI. r. 36.

Where the creditors covenanted that, so long as the debtor performed his part of the agreement, he should be free from let, suit and molestation, and that any creditor who sued should forfeit his debt, it was held that a suit instituted by the plaintiff for the execution of the trusts of the deed did not operate to forfeit the plaintiff's debt (c).

Action for execution of trusts of deed no breach of covenant not to sue or molest debtor.

Where the arrangement is a composition agreement, it is usual for the debtor (either alone or with sureties) to covenant for the payment of the composition, and it is important to consider, what creditors have the right of suing on such covenants. Whether a creditor can enforce such covenant, will depend on the terms of the covenant, and on the description of the parties between whom the deed is expressed to be made.

Who may sue on covenants.

(a) *Drever v. Mawdesley*, 16 Sim. 511.

(b) *Prosser v. Edmonds*, 1 Y. & C. 481, 495. Cf. *Bateman v. Margerison*, 6 Ha. 496.

(c) *O'Brien v. Osborn*, 10 Ha. 92.

Where deed *inter partes*, only those so described can sue on it.

*Chesterfield Colliery Company v. Hawkins.*

The general rule is, that where a deed is expressed to be made *inter partes*, no person can enforce its provisions except those who are named, *or described*, in it as parties (a). Thus, where a composition deed was expressed to be made between "the several persons whose names and seals are subscribed and affixed in the schedule, being creditors" of the first part, the debtor of the second part, and two sureties of the third part, and contained covenants by the parties of the second and third parts with the parties of the first part, *and with all the other creditors* respectively, to pay them respectively a composition of 10s. in the pound, it was held that creditors who did not execute the deed were not parties within the above description, and could not sue on the covenants, and that consequently, there being an inequality between the position of the executing and non-executing creditors, the deed was not binding on a non-assenting creditor under the Bankruptcy Act, 1861, sec. 192, (b).

Persons may be parties by description.

*Gresby v. Gibson.*

*M'Laren v. Baxter.*

Persons may, however, become parties by a *general description*. Thus, where the deed was expressed to be made with "all the creditors," and the debtor covenanted with each creditor severally, it was held that all the creditors were parties to the deed, and could sue upon the covenants (c). And where a deed was made between J. B., the debtor, of the first part, and "the several persons whose names are subscribed, &c., creditors of J. B. *on behalf of themselves and all and every other the creditors of J. B.,*" of the second part, and the debtor covenanted with "each

(a) *Per cur. Storer v. Gordon*, 3 M. & S. 322.

(b) *Chesterfield, &c., Colliery Company v. Hawkins*, 3 H. & C. 677; *Gurrian v. Kopera*, 3 H. & C. 694; and see *Ex parte Cockburn*, 33 L. J. Bkcy. 17.

(c) *Gresby v. Gibson*, L. R. 1 Ex. 112; *Reeves v. Watts*, L. R. 1 Q. B. 412.

and every of his said creditors" to pay the composition, it was held, that the deed might be construed as making all the creditors parties (and therefore capable of enforcing the covenant), since, if necessary, the Court would read the deed as if a stop were inserted after the words "on behalf of themselves," by which construction all the creditors would in terms be parties to the deed (a).

It has been held, that where one only of two partners signed the deed in the name of his firm, he could sue on the covenant contained in the deed without joining his co-partner (b).

One partner executing in name of firm can sue alone on covenants.

(a) *M'Laren v. Baxter*, L. R. 2 C. P. 559; *Isaacs v. Green*, L. R. 2 Ex. 352.

(b) *Metcalf v. Rycroft*, 6 M. & S. 75; see now R. S. C., Ord. XVI., r. 11, as to non-joinder and mis-joinder of parties.

## CHAPTER IX.

HOW FAR CREDITORS' DEEDS ARE AFFECTED BY STAT. 13  
ELIZ. C. 5.

13 Eliz. c. 5. THE Stat. 13 Eliz. c. 5 (a), after reciting that "feoffments, gifts, grants, alienations, conveyances, bonds, suits, and executions have been contrived of malice, fraud, covin, collusion, &c., to delay, hinder or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, &c.," declares that "every feoffment, &c., of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution made for any intent and purpose before declared and expressed, shall be as against that person, his heirs, successors, executors, &c., whose actions, suits, &c., are or might be in anywise disturbed, hindered, delayed or defrauded, *utterly void*," with a proviso (sec. 6) that the Act "shall not extend to any estate or interest in lands, &c., goods or chattels, made on good consideration and *bonâ fide* lawfully conveyed to any person not having notice of such covin."

Secrecy a  
badge of  
fraud.

Under this statute, it has been held, that the secrecy of the assignment, and the fact that possession has not

(a) Made perpetual by 29 Eliz. c. 5.

been taken by the assignee—unless such non-possession is consistent with the terms of the assignment—are material elements in determining whether the transaction is fraudulent, and in some cases afford such strong evidence of fraud as to be irresistible (a). Where, however, these elements are not present, the question has arisen in numerous cases, whether an assignment by a debtor of his property, in trust, either for his creditors generally, or for a particular creditor or creditors, with the intention of defeating or delaying some creditor about to issue execution, is void under the statute. The decisions establish, that where the conveyance is made *bonâ fide* and with a full intention that the property shall pass, it will not be fraudulent under the statute although intended to defeat the execution (b).

Assignment for benefit of creditors with view of defeating expected execution, not usually void under the statute.

Thus in *Pickstock v. Lyster* (c) where a debtor, with a view to defeating the plaintiff of his execution, assigned all his property to trustees for the benefit of his creditors, under which assignment possession was immediately taken (d), it was held not void under the statute, the reason being, that if a man assigns all his property to a trustee, for the purpose of having it fairly distributed among all his creditors, such an assignment, although it may have the effect of hindering and depriving a particular creditor of his execution, is not within the spirit of the Act, and therefore is not void, although strictly within its letter (e); and even an assignment to an individual

*Pickstock v. Lyster.*

(a) *Twyne's Case*, 3 Rep. 80; 1 Sm. L. C.<sup>s</sup> 1, q. v.

(b) *Pickstock v. Lyster*, 3 M. & S. 271; *Holbird v. Anderson*, 5 T. R. 235; *Siggers v. Evans*, 5 E. & B. 367; *Wood v. Dixie*, 7 Q. B. 892.

(c) *U. s.*

(d) See *Twyne's Case*, *u. s.*

(e) *Per Maule, J., Janes v. Whitbread*, 11 C. B. 416.

creditor, with a view to preferring him to a creditor on the eve of obtaining execution, is not void under the statute (a).

Deed while revocable may be avoided under the statute.

*Secus*: where no longer revocable.

*Siggers v. Evans.*

Title vests in creditor-trustee before assent.

So long as the deed continues revocable, there is a possibility of its being a cloak for a benefit to the grantor, and it cannot be regarded as made with a *bonâ fide* intention of passing the property (b). But, where (as by communication to and assent by the creditors) the deed has become irrevocable, then it will be good against a subsequent execution (c); and the doctrine of the deed being a mere power in the hands of a mandatory or agent, and revocable until communicated to and assented to by the creditors, does not apply where the deed is made to one who takes a beneficial interest under it (d); and, therefore, where the debtor made an assignment of his property to a trustee, who was himself a creditor, and communicated the fact by letter to the trustee, who replied to it announcing his assent, but in the meantime the defendant had delivered a writ of *fi. fa.* against the debtor to the sheriff, it was held, that the deed was no longer revocable after it had been communicated to the trustee, and that the title vested in the trustee by the mere execution of the assignment unless he dissented (e).

The case of *Siggers v. Evans* (f) was considered in

(a) *Holbird v. Anderson*, 5 T. R. 235. Of course such an assignment is liable to be set aside as a fraudulent preference if a bankruptcy ensues, 46 & 47 Vict. c. 52, sec. 48.

(b) *Smith v. Hurst*, 10 Ha. 30.

(c) *Harland v. Binks*, 15 Q. B. (N.S.) 713.

(d) *Siggers v. Evans*, 5 E. & B. 367; but see *Smith v. Hurst*, *u. s.*

(e) *Siggers v. Evans*, 5 E. & B. 367, see *ante*, p. 103; and *cf.* *Mackinnon v. Stewart*, 1 Sim. (N.S.) 76.

(f) *U. s.*

*Hobson v. Thelluson* (a), and it was there held to be a necessary consequence of that decision, that notice to the assignor of the issue of a writ was notice to the trustee; and, therefore, where a debtor, who had notice of the issue of a writ of execution against his goods, assigned them, after that notice, to two creditors upon trusts for the benefit of themselves and all other creditors, the trustees were taken to have had notice of the writ, and they being therefore excluded from the protection of sec. 1 of the Mercantile Law Amendment Act, 1856 (b), the goods were held bound from the time of the delivery of the writ to the sheriff (c).

Notice to debtor of delivery of writ of execution is notice to creditor trustee.

It has been held, that an assignment for the benefit of creditors, which imposes very onerous terms on the creditors who participate in the benefit, is void under this statute against creditors not executing it.

Assignment imposing onerous terms on creditors void under Statute.

Thus, where the deed contained minute provisions investing the trustees with power to carry on the debtor's trade, for which purpose they were authorized to lay out money in payment of rent, &c., and in keeping up the stock, the Court held the deed void as being one to which creditors could not reasonably be expected to become parties—in view of the possibility that the arrangement might be deemed to constitute them partners (d).

*Owen v. Body.*

(a) L. R. 2 Q. B. 642.

(b) 19 & 20 Vict. c. 97; Sec. 1, provides that no writ of *fi. fa.* or other writ of execution and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide* and for valuable consideration before the actual seizure or attachment thereof by virtue of such writ; provided that such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner.

(c) *Hobson v. Thelluson*, L. R. 2 Q. B. 642.

(d) *Owen v. Body*, 5 A. & E. 28; but see *Cox v. Hickman*, 18 C. B.



Deed not necessarily void for empowering trustees to carry on business.

This last case was considered in *Janes v. Whitbread* (a), and the Court decided that a deed was not necessarily void, which empowered the trustees to carry on the business, if the main object of the deed was, not (as in *Owen v. Body*) "the carrying on of an extensive business for the purpose of making money to pay the creditors who became parties to the deed" (b) but, the sale of the property and the winding-up of the business, the power given to carry on the trade being intended to be merely subsidiary to the winding-up of the concern (c).

Deed held void for onerous provision.

*Spenser v. Slater.*

In a recent case (d), a debtor in insolvent circumstances assigned all his property to trustees, upon trust to carry on his business or get in and realise his estate in such manner as they should deem expedient and, after payment of expenses and preferential claims, to apportion the residue among the creditors. It was provided that the execution of the deed, or the assent thereto, by a creditor should operate as a release to the debtor of the debt of such creditor, that dividends should be paid to the creditors executing or assenting, and set aside for such as failed to do so, and that at the expiration of twelve months the debtor might apply to the trustees to be paid the dividends set aside for such last mentioned creditors, and that the dividends of any creditors who failed to execute or assent before the expiration of a seven days' notice should be paid to the debtor. It was also provided, in very special terms, that the executing and assenting

617; 3 C. B. (N.S.) 523; 9 C. B. (N.S.) 47, *post*, p. 185. Erle, C.J., in *Gooch v. Deakin*, 1 N. R. 95, remarked that *Owen v. Body* was a case to which he had never heard any one give a good word.

(a) 11 C. B. 406.

(b) *Per* Maule, J., 11 C. B. 419.

(c) *Cf. Coates v. Williams*, 7 Exch. 205.

(d) *Spenser v. Slater*, 4 Q. B. D. 13.

creditors should indemnify the trustees against any personal loss or risk they might sustain, otherwise than by their own wilful neglect or default, by reason of their proceedings under the deed. The Divisional Court (Mellor and Manisty, JJ.) held the deed void as against an execution creditor. This decision, if sound, must rest on the ground that the provisions as to carrying on the business, and indemnifying the trustees, were such as no creditor could reasonably be expected to agree to, and that as there would be a resulting trust in favour of the debtor in respect of the dividends set aside for creditors who refused to come in, the assignment was one practically for the benefit of the debtor and not for the benefit of creditors.

This case was distinguished in *Boldero v. The London and Westminster Loan and Discount Company, Limited* (a). Here the trusts were to sell the property, and, after paying expenses, to divide the residue of the proceeds rateably among the creditors parties to the deed (including, if the trustees should think fit, but not otherwise, creditors who refused or neglected to execute), and to pay the dividends apportioned to non-assenting creditors to the debtors, if the trustees thought proper, but not otherwise. The deed empowered the trustees to make the debtors an allowance for maintenance, and to carry on the business, and provided for the creditors indemnifying the trustees. The Court (Pollock and Huddleston, BB.) held that the deed was not void under the statute, that the power to carry on the business was only with a view to disposing of it as a going concern, and, distinguishing the case of *Spenser v. Slater* (b), came

Secus :  
*Boldero*  
*v. London*  
*& West-*  
*minster*  
*Discount*  
*Company.*

(a) 5 Ex. D. 47.

(b) *Ante*, p. 112.

to the conclusion that there was nothing leading to the inference that the assignment was intended to delay creditors.

*Spenser v. Slater*  
considered.

On the whole, the cases with reference to the avoidance of deeds, on account of onerous provisions contained in them, are far from satisfactory, and it may well be doubted whether the decision in *Spenser v. Slater* (a) is sound. If it is, it seems only explicable on the grounds above suggested. The grounds referred to in the judgment are, it is submitted, not consistent with the current of decisions. The real test of the validity of a deed under the statute is, whether the assignment was *bonâ fide*,—i.e. whether it was not a mere cloak for retaining a benefit to the grantor (b),—for, as was pointed out by Giffard, L.J. (c), the Statute of Elizabeth does not touch the question of the equal distribution of assets; and it does not make any difference with regard to that statute, whether the deed deals with the whole or only a part of the grantor's property. "If the deed is *bonâ fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the Statute of Elizabeth" (d), and this exposition of the law was cited with approval and followed by Thesiger, L.J., in the recent case of *Ex parte Games, re Bamford* (e).

Statute  
does not  
touch  
equal dis-  
tribution  
of assets.

*Ex parte Chaplin, re Sinclair.*

Deed de-  
signed to  
conceal

The most recent case in connection with the statute 13 Eliz. c. 5, is *Ex parte Chaplin, re Sinclair* (f). It should be observed, however, that the deeds there, which were held by Fry, L.J., to be void under the Statute of

(a) *Ante*, p. 112.

(b) *Alton v. Harrison*, 4 Chy. 622.

(c) 4 Chy. 626.

(d) *Per* Giffard, L.J., 4 Chy. 626; *cf. Evans v. Jones*, 3 H. & C. 423, *per* Bramwell, B.

(e) 12 Chy. Div. 324.

(f) 26 Chy. Div. 319.

Elizabeth (the other members of the Court not expressing an opinion on the point), did not constitute a creditors' deed, and this may be regarded as partly the *ratio decidendi*. The debtor Sinclair, who was in embarrassed circumstances, executed two deeds of even date, by which he assigned to Messrs. Chaplin, to whom he was indebted, substantially the whole of his property. The first deed, by which he assigned (*inter alia*) his furniture, stock-in-trade, book debts, and the goodwill of his business, was expressed to be in consideration of the release by the Chaplins of a debt of £3271 then owing to them by Sinclair. The second deed, by which he assigned his interest in the lease of his business premises, purported to be in consideration of £50 paid by the Chaplins to Sinclair on the execution of the deed. There was, in fact, at the date of the deeds, only £1370 due from Sinclair to the Chaplins, and the real consideration for the deeds was the release of that debt and a verbal agreement that the Chaplins should undertake the payment of some of Sinclair's other debts. It was somewhat doubtful, what the debts were, that were to be so paid, but the sum of £3271 appeared to be the estimated amount of them, including Sinclair's debt to the Chaplins. By a contemporary agreement, Sinclair undertook to manage the business, as agent for the Chaplins, at a weekly salary. After the execution of the deeds the business continued to be carried on as before, ostensibly as Sinclair's, but really under the direction of the Chaplins. The Chaplins, before the deed, paid out some executions against Sinclair, and after the execution of the deed paid the rent that was in arrear. It was held, by Cotton and Bowen, LJJ., that the deeds were void as against Sinclair's trustee in bankruptcy as an act of bankruptcy,

from creditors real nature of transaction void.

Fry, L.J.

and, by Fry, L.J., that the deeds were void as against Sinclair's creditors under the statute 13 Eliz. c. 5. The following extracts from Fry, L.J.'s judgment will show the grounds of his decision. After referring to the form of the instruments, he proceeds (a): "Why was the deed drawn in that form? It appears to me it was so drawn for the purpose of concealing the real facts of the case, and representing to any persons to whom the deed might become known that that sum (£3271) was, at the time of the execution of the deed, due from Sinclair to the Messrs. Chaplin, to conceal from such person the fact that there was a contract between them and him, that they should pay Sinclair's debts, so that if the deed came to the eye of any of the creditors, he would have no means of knowing or suspecting the existence of any contract beneficial to him which Sinclair could enforce. Then, I ask myself, why was the deed drawn that way? Was it a mere conveyancing blunder, or was the end and intent to put it in such a form that the remedies of the creditors might be delayed? . . . When I look not merely at the form of the deed and the falsity of its statements, but consider, as I am bound to do, the conduct of the parties under it, I come distinctly to the conclusion that the intention was to do that which the deed, in fact, did, namely, *to hide from the creditors the real facts of the case, and thereby—not to defraud them, but—to hinder and delay them in enforcing their legal rights* (b)."

It would seem, therefore, that where there is an assignment for the benefit of creditors and the trust for creditors is apparent on the face of the deed, the reasons of the decision of *Ex parte Chaplin, re Sinclair*, will not be applicable.

(a) 26 Chy. Div. 337.

(b) See further, in reference to this case, *post*, p. 196.

The effect of delay upon the right of a creditor to maintain an action to set aside a deed as fraudulent and void under the Statute of Elizabeth was considered in the very recent case of *The Three Towns Banking Company v. Maddever* (a). The plaintiffs (who were specialty creditors) ten years after the execution of a conveyance of land, of which they had been aware from the first, brought an action to set it aside, *but made no claim to the income of the property in the interval*. It was held by North, J., and afterwards by the Court of Appeal (Baggallay, Cotton, and Lindley, L.JJ.), that the right of a creditor to impeach such a deed could not be barred by the lapse of any time short of the period fixed by the Statute of Limitations. It does not appear from the judgments in either Court, at what period the plaintiffs' claim would have been statute-barred, but it would seem that no creditor could succeed in such an action whose *debt* had become barred, nor against a defendant who had acquired a possessory title to land, though the circumstances might be such as to amount to concealed fraud within sec. 26 of the Real Property Limitation Act (b), and so prevent the acquisition of a possessory title by persons having notice of the fraud.

Statute of  
Limita-  
tions.  
*Three  
Towns  
Banking  
Company  
v. Mad-  
dever.*

(a) 52 L. J. Chy. 733; 53 L. J. Chy. 999.

(b) 3 & 4 Wm. IV. c. 27, which is to be construed together with 37 & 38 Vict. c. 57.

## CHAPTER X.

THE BILLS OF SALE ACTS AS AFFECTING CREDITORS'  
DEEDS.

41 & 42,  
Vict., c.  
31, sec. 4. By the Bills of Sale Act, 1878 (a), sec. 4, it is provided that the expression, "bill of sale," shall not include "assignments for the benefit of the creditors of the person making or giving the same."

To come within exception, assignment must be for benefit of all creditors. An assignment, therefore, for the benefit of creditors will not be void for want of registration as against an execution creditor, or a trustee in bankruptcy; but it would seem that to come within the exception the assignment must be for the benefit of all the creditors of the assignor.

*General Furnishing, &c., Company v. Venn.* Under the corresponding provision of the Act of 1854 (b), it was held that a deed which did not on the face of it appear to be for the benefit of *all* creditors, but of the benefit of which the Court held that any creditor might avail himself, was within the exception and exempt from registration (c). The deed in question began as

(a) 41 & 42 Vict. c. 31, with which the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), is to be construed as one (*ib.* sec. 3).

(b) 17 & 18 Vict. c. 36, s. 7.

(c) *General Furnishing and Upholstery Company v. Venn*, 2 H. & C. 153, followed in *Boldero v. London & Westminster Discount Company*, 5 Ex. D. 47, see *ante*, p. 113.

follows: "To all to whom these presents shall come, we whose names and seals are hereunto subscribed and set, being severally and respectively creditors of V., &c., greeting," and—after a recital that V. was indebted "to the said several creditors in the several sums set opposite their names in the schedule," and that, being unable to pay his debts in full, he had offered a composition, payable by instalments, which the creditors had agreed to accept in full satisfaction—the creditors released their debts. Then followed a further recital to the effect that B. had agreed to become security for the first two instalments "and hereby guarantees the payment" thereof at the appointed time, "to the creditors whose names and claims are mentioned in the schedule hereto," and the deed proceeded: "and V. hereby covenants with the said B., that in consideration of the said B. having become security as hereinbefore mentioned, he, the said V., has granted and assigned unto the said B. all his stock in trade, &c., for the payment of the instalments of the composition as hereinbefore mentioned *in trust for the said creditors.*" On an interpleader issue between an execution creditor and B. the Court held that this deed was meant to be for the benefit of all creditors; but Bramwell, B., entertained great doubt whether, to bring a deed within the exception, it was not necessary that the deed should be *on the face of it* for the benefit of all creditors.



## CHAPTER XI.

CREDITORS' AGREEMENTS AS AFFECTING SECURITIES AND  
REMEDIES AGAINST PERSONS OTHER THAN THE DEBTOR  
DISCHARGED.

- (i.) *Discharge of principal as affecting co-principals.*
- (ii.) *Discharge of principal as affecting surety.*

IN entering into an arrangement with his debtor, it is of the utmost importance for a creditor to consider, whether the terms of the agreement will prejudice any securities that he holds, and any remedies he may have against persons liable (whether as principals or sureties) jointly with the debtor whom he proposes to discharge.

The present chapter will be occupied by considering (I.) how far a creditor, by discharging a principal debtor, will discharge ( $\alpha$ ) persons liable jointly with him as principals; ( $\beta$ ), persons liable as sureties for him, and (II.) how the discharge of a surety affects co-sureties. In the following chapter we shall consider (III.) how the discharge of a debtor affects the creditor's right to enforce securities whether *in rem*, as in the case of mortgages or *in personam*, against parties liable on such securities, where the debtor discharged is not the person primarily liable thereon, as in the case of a bill of exchange accepted for value of which the debtor is drawer.

I. Discharge of Principal Debtor.

(a) As affecting Co-principals.

A release to one of several obligors, whether they are bound jointly or jointly and severally, discharges the others, and may be pleaded in bar by all (a); and generally if there be satisfaction made by one of several joint, or joint and several, debtors it is a discharge of all (b).

But, where two are bound jointly (c) or jointly and severally, and the obligee covenants with one of the obligors only, *not to sue him*, it does not amount to a release, and the obligee may still sue the other obligor (d); so where the obligee of a bond covenanted not to sue one of two joint and several obligors, and if he did that the deed of covenant might be pleaded in bar, he might still sue the other obligor (e). So where B. and C. were jointly indebted to A., and he sued B. alone, but abandoned his action in consideration of a smaller sum than the amount of the debt, it was held this did not discharge C., the Court holding that the payment was not intended to be in *satisfaction* of the debt (f).

One reason, why a release to one debtor releases all jointly liable, is given by Patteson, J., in *North v. Wakefield* (g): "it is because unless it were held to do so, the

Discharge of one of several principals.

Release of one releases all.

Satisfaction by one discharges all.

Covenantor not to sue one; no discharge to others.

Compromise of action against one.

Reasons of rule that release of one is release of all.

(a) 2 Ro. Abr. 412 G.; *Clayton v. Kynaston*, 2 Salk. 574; 2 Wms. Saund. p. 48.

(b) *Per* Eyre, C.J., *Cheetham v. Ward*, 1 B. & B. 633; *per* Lord Denman, C.J., *Nicholson v. Revill*, 4 A. & E. 683.

(c) *Hutton v. Eyre*, 6 Taunt. 289.

(d) *Lacy v. Kynaston*, 2 Salk. 575; *Walmsley v. Cooper*, 11 A. & E. 216.

(e) *Dean v. Newhall*, 8 T. R. 168.

(f) *Watters v. Smith*, 2 B. & Ad. 889; and *cf. Ex parte Good, re Armitage*, 5 Chy. Div. 46.

(g) 13 Q. B. 541.

co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released, but that reason does not apply where the debtor released agrees to such a qualification of the release as will leave him liable to any rights of the co-debtor."

*Nicholson  
v. Revill.*

Lord Den-  
man, C.J.

In *Nicholson v. Revill* (a), however, where the Court held that the plaintiff had released the defendant by striking out the name of his co-debtor on a joint and several promissory note, Lord Denman, C.J., said: "We do not proceed on some of the grounds mentioned at the bar, such as the effect of the plaintiff's alteration of the instrument as making it void, *or that the defendant thereby lost his right to contribution from the joint makers of the note*; nor on any doctrine as to the relation of principal and surety. We give our judgment merely on the principle laid down by Lord Chief Justice Eyre in *Cheetham v. Ward* (b), as sanctioned by unquestionable authority, that the debtee's discharge of one joint and several debtor is a discharge of all"—a proposition which is explained by Eyre, L.C.J., in the case referred to (c) as resting on the fact that there is but one duty extending to both obligors, and therefore a discharge of one, or satisfaction made by one, is a discharge of both.

Release  
operates to  
extinguish  
the debt.

Release  
with  
proviso  
reserving  
remedies  
against  
persons  
jointly  
liable con-  
strued as  
covenant  
not to sue.

Since, then, a *release* to one co-debtor operates to extinguish the debt (d), it follows that if a release is made subject to a proviso, that it shall not extend to discharge those bound jointly with the debtor released, the proviso and the release will be repugnant to each other. The question accordingly arose, whether in such a case the release was to be restricted by the subsequent

(a) 4 A. & E. 675.

(b) 1 B. & P. 630.

(c) *ib.* p. 633.

(d) *Cheetham v. Ward*, 1 B. & P. 633; *per* Willes, J., L. R. 7 C. P. 14.

proviso, or the proviso was to be rejected as inconsistent with the absolute release. This question was considered in *Solly v. Forbes* (a), where the plaintiffs had accepted a composition from one partner and released him, the release being expressed to be "subject nevertheless" to a proviso (which immediately followed) to the effect that it should not prejudice any claims which the plaintiffs might have against his co-partner. It was urged that this proviso ought to be rejected as inconsistent with the release that preceded, but the Court refused to construe the instrument contrary to the clear intention of the parties, and held that the whole instrument must be read together, and that, looking at it so, the release was a qualified and not an absolute one. In spite of some strong expressions of opinion that it was impossible to release one joint and several debtor and reserve remedies against the other (b), the Courts have lent their aid to effectuate the intention of the parties, and the rule that a release expressly qualified in this manner is to be construed as a covenant not to sue is now well established (c).

*Solly v.  
Forbes.*

The general rule of law with regard to the effect of the discharge of one of several joint debtors is lucidly summed up in the recent case of *Swire v. Redman* (the judgment in which was prepared by Lord Blackburn) in the following words:—

"We think it clear law that a creditor who has two principal debtors, may bind himself to one of them (in any way short of an absolute release) to give him time,

Lord  
Blackburn.

(a) 2 B. & B. 38.

(b) *Per* Lord Denman, C.J., in *Nicholson v. Revill*, 4 A. & E. 683. See *contra per* Parke, B., *Kearsley v. Cole*, 16 M. & W. 136.

(c) *Thompson v. Lack*, 3 C. B. 540; *Price v. Barker*, 4 E. & B. 760; *per* Lord Hatherley in *Green v. Wynn*, L. R. 4 Chy. 406; and *cf.* *Bateson v. Gosling*, L. R. 7 C. P. 9.

Lord  
Blackburn.]

or even not to sue him, without in the least prejudicing his right of recourse against the other. By suing that other debtor, a recovery from him entitles him to recover contribution from his co-debtor, and consequently the creditor may by his suit against the one debtor bring about such a state of things as renders him, the creditor, liable to an action by the co-debtor who has been forced to make contribution, when by bargain between the creditor and himself he ought not to have been; but this forms no defence for the other debtor" (a).

Release  
intended to  
be qualified  
by reserve  
of remedies  
against  
co-debtors  
must be so  
expressed  
on the  
instrument.

*Brooks v.  
Stuart.*

Where the release is intended to be qualified by a reserve of remedies against co-debtors, such qualification must appear on the instrument itself, and parol evidence that a release, which purports to be absolute, was intended to be qualified will not be admissible (b). Accordingly, where in an action against one debtor on a joint and several promissory note the defendant pleaded a release to his co-debtor, a reply that such release was made at the request of the defendant, and that the defendant afterwards (the note being still unpaid), in consideration of such release ratified his promise and promised to remain liable to the plaintiffs for the amount of the note, was held bad, as setting up a parol exception to a release under seal (c).

*A fortiori*  
in case of  
arrange-  
ment with  
creditors,

The rejection of parol evidence in this last case rested on the laws of evidence, but there is a further reason, in the case of *creditors' agreements*, why such evidence would be inadmissible, unless it were shown that the qualification of the release was known to other creditors (d).

(a) As to the rare case of two persons being severally bound only and the release of one, see *per* Maule, J., *Thompson v. Lack*, 3 C. B. 540, 549.

(b) *Cocks v. Nash*, 9 Bing. 341.

(c) *Brooks v. Stuart*, 9 A. & E. 854.

(d) *Cf. per* Lord Eldon, *Jackman v. Mitchell*, 13 Ves. 581.

We have already alluded to the rule (to which we shall have occasion to return hereafter) which forbids a creditor ostensibly to accept the terms of an arrangement and privately to secure some peculiar advantage to himself—even apart from any actual fraud; and where a creditor concurs in an arrangement, by which he purports to release the debtor, and at the same time enters into a secret agreement with those jointly liable with the debtor, that they shall continue liable in spite of the release, the case comes within the spirit of the rule, and such agreement, whether by parol or by a separate instrument, cannot stand (a).

Two principal debtors have no power to alter their position with regard to the creditor and become principal and surety respectively without the consent of the creditor (b).

Two principals cannot convert themselves into principal and surety.

Although a person who has held himself out as a partner is liable jointly with the real debtor to an action by a creditor, yet, as between the ostensible partner and the real debtor, the former is not liable to contribution, and therefore the discharge of the ostensible partner by the creditor does not discharge the debtor (c).

Discharge of ostensible partner no discharge of real debtor.

(β). *Discharge of Principal as affecting Sureties.*

The reasons already given, why the release of one co-debtor operates as a release of those who are jointly bound with him, apply with additional force where the latter are only sureties. In fact, a creditor as a general rule discharges a surety not only by *releasing*, but by discharging or compounding with, or entering into a

Surety discharged by discharging or giving time to principal.

(a) See also *post*, p. 127 *seq.*

(b) See *Swire v. Redman*, 1 Q. B. D. 536, *post*, p. 137.

(c) *Ex parte Good*, re *Armitage*, 5 Chy. D. 46.

binding agreement to give time to the principal debtor (a). The reasons for this take the form of a dilemma, for either (1) the discharge of the principal is an implied discharge of the surety, because, if the creditor were subsequently to recover the amount from the surety, it would give the latter a right to proceed against the principal for the very debt from which the creditor had just agreed to discharge him (b); or (2) if the discharge of the principal is complete, by depriving the surety of his right to recover from him any sums he is obliged to pay, then the situation and risk of the surety are altered without his consent, and he is placed in the position (for which he never contracted) of being liable to be called upon to pay the debt of another man without any means of indemnifying himself.

Exceptions.  
1. Where there is reserve of remedies against sureties without their consent.

It is obvious, however, that where the agreement for the discharge of the principal contains a reservation of remedies against the surety (though the surety does not consent thereto), any implication of an *intention* to discharge the latter is rebutted, so that the first reason becomes inapplicable (c), and, on the other hand, the surety is not prejudiced, because the debtor's consent that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him (d).

2. *A fortiori* where there is

*A fortiori*, where the agreement for the discharge of the principal debtor is made with a reservation of remedies

(a) The mere acceptance, however, of a smaller sum from the principal debtor *in part payment* does not discharge the surety (*Walwyn v. St. Quintin*, 1 Bos. & P. 656).

(b) *English v. Darley*, 2 Bos. & P. 61, and *Burke's Case* there cited by Lord Eldon; *Ex parte Gifford*, 6 Ves. 805; *Boulton v. Stubbins*, 18 Ves. 20; *Ex parte Glendinning*, Buck, 517.

(c) *Kearsley v. Cole*, 16 M. & W. 128.

(d) *Ib.* and *Nichols v. Norris*, 3 B. & Ad. 41, n.

against the surety, to which the latter consents, not only is all implication of intention to discharge him rebutted, but it is clear that the surety cannot complain of being prejudiced by an arrangement to which he consents (a).

such a reservation and sureties consent thereto.

The consent of the surety to the reservation of remedies against him does not (in the absence of any agreement to the contrary) interfere with his right to be indemnified by the principal against any sums he may be compelled to pay the creditor (b).

Surety's consent no bar to his rights against principal.

Where a surety had authorized the creditor to discharge the principal debtor, it was held that such authority was not determined by the bankruptcy of the surety of which the creditor had not notice (c).

Surety's consent not determined by bankruptcy.

The question was considered in *Ex parte Glendinning* (d), whether, in the case of a composition deed, parol evidence was admissible of an agreement that rights against sureties should be preserved, and the Chancellor decided that it was not (e).

Parol evidence or reservation of remedies against surety not admissible.

In a note to *Lewis v. Jones* (f) the case of *Ex parte Glendinning* was commented on in the following terms:—"In *Ex parte Glendinning*, the Lord Chancellor is reported to have said, that a creditor entering into an agreement for a composition with a debtor, and wishing to retain his remedy against a surety, must cause the reservation to appear on the face of the agreement, for that parol evidence cannot be admitted to explain or vary the effect

(a) *Kearsley v. Cole*, 16 M. & W. 128.

(b) *Kearsley v. Cole*, u. s.; *Close v. Close*, 4 D. M. & G. 176.

(c) *Ex parte MacDonnell*, Buck, 399.

(d) Buck, 517.

(e) Cf. *per* Lord Cairns in *Oriental Financial Corporation v. Overend*, L. R. 7 H. L. 361.

(f) 4 B. & C. 516. This note was attributed to Holroyd, J., by Parke, B. (16 M. & W. p. 136), but was ascribed by Willes, J. (L. R. 7 C. P. 14), to Mr. Cresswell.



Note to  
*Lewis v.*  
*Jones.*

of the instrument. If that observation is to be construed generally, it will greatly simplify questions upon this subject; for then, wherever a creditor and principal debtor have entered into an agreement for a composition, not containing a reservation of the remedy against a surety, and an action is afterwards brought against the latter, it will be unnecessary to inquire whether he was or was not privy and consenting to the agreement, or whether he has or has not done anything to deprive himself of the right to recover over against the principal; he will be absolutely discharged by the agreement entered into between the creditor and the principal debtor. But the judgment in *Ex parte Glendinning* appears to be founded upon *Burke's Case*, which is also cited by the Lord Chancellor in *Ex parte Gifford* (a) as an authority for saying that where the remedy against the surety is reserved in the agreement for composition, a recovery against the surety cannot operate as a fraud against the principal, for that, if demand out of that recovery arises against him, it is with his consent. Perhaps, therefore, the observation in *Ex parte Glendinning* was intended to apply to those cases only where, but for the reservation in the agreement, the proceeding against the surety would operate as a fraud upon the principal, and parol evidence may still be admissible to show that the composition was made *with the privity and at the request of a surety, and that he has deprived himself of any right to recover over against the principal*; for such evidence would leave the written instrument (according to its import) a discharge to the principal, and would not contradict it, unless indeed it be so framed as to *extinguish* the debt."

(a) 6 Ves. 809.

Now, wherever the deed purports to *release* the principal debtor, this operates as an extinguishment of the debt, and to admit parol evidence of the reservation of remedies against the surety *would* be to admit parol evidence to contradict the written instrument (a). Assuming, however, that the admission of parol evidence of the reservation might not, in the case suggested in Mr. Cresswell's note, be against *the laws of evidence* (on the ground that such reservation would not be *inconsistent* with the written instrument), yet it is difficult to see how such reservation could in the case of an agreement with creditors be valid (unless it were proved to have been communicated to the creditors generally), because it would amount to a private stipulation for the benefit of a particular creditor, and as such a fraud on the others, as was pointed out by Bayley, J., in *Lewis v. Jones* (b), the case to which the above cited note is appended (c).

When principal released reservation inconsistent with written instrument.

Also void as private stipulation for benefit of particular creditor.

The case, however, of *Ex parte Harvey* (d) requires notice, as it does not seem quite consistent with the principle as here laid down. E. B. had joined as surety with E. T. B. in a joint and several promissory note to secure E. T. B.'s debt to Harvey and Hudson, a firm of bankers. E. T. B. afterwards made an assignment of his property to three trustees (Harvey, S., and another creditor) for the benefit of his creditors. The deed contained a release by the creditors, but no reservation of rights against sureties. It was executed by Harvey.

*Ex parte Harvey.*

(a) Cf. *Cocks v. Nash*, 9 Bing. 341; *Brooks v. Stuart*, 9 A. & E. 854, see *ante*, p. 124.

(b) 4 B. & C. 506, 511; and see *ante*, p. 75.

(c) And see the remarks of Patteson, J., in *North v. Wakefield*, 13 Q. B. 536, in which case he points out that the reserve of rights against the surety was not a fraud on the creditors as it appeared on the face of the deed.

(d) 23 L. J. Bkcy. 26.

*Ex parte  
Harvey.*

and the two other trustees (but there was no evidence to show when the latter executed), and these were the only creditors who executed the deed. Evidence was given to show that Harvey executed the deed, *with the privity and at the request of the surety*, on the express understanding that his rights against the surety were not to be prejudiced thereby. After the execution of the deed, E. B., the surety, was adjudicated bankrupt; and the bankers claimed to prove against his estate, contending that their rights against him were preserved by the arrangement between them and E. B. The Lords Justices held that they were entitled to prove, on the ground apparently that, if Harvey had been informed that in its actual form the deed would operate as a release to the surety, he would have declined to execute it, and that, as his execution was induced by the surety's misrepresentation of the effect of the deed (a), the Court would not allow the surety, or those who represented his estate, to benefit by the release.

*Onus of  
proof that  
agreement  
was un-  
known to  
creditors  
lies on  
party  
alleging  
fraud.*

It will be observed, that the question of fraud on the creditors hardly arose in this case, as it was clear that the reservation of rights against the surety was known to S., who also claimed to have reserved his own rights against E. B. as surety; and the only other person who executed the deed was the third trustee, as to whom there was no evidence whether he knew of the reservation or not. Under such circumstances the remarks of Alderson, B., in *Davidson v. McGregor* (b) are in point. "It does not appear on the pleadings, nor was it proved at the trial, that this reservation of the plaintiffs' rights against the defendant was not known to the other creditors, neither does it appear affirmatively to have been known to them. But inasmuch as the defendant is seeking to establish

(a) See, however, *Lewis v. Jones*, 4 B. & C. 506, *ante*, p. 72.

(b) 8 M. & W. 755, 768.

that this agreement, which he has in fact entered into, was invalid in law, we think that the fact ought to have been proved by him."

A third exception to the rule, that a discharge of the principal is a discharge of the surety, is where the original instrument of guaranty provides that composition with the principal shall not release the surety. Where the original guaranty was in these terms, and the plaintiffs compounded with the principal without the privity of the surety, and without a reservation of their rights against him, it was held nevertheless that the surety was not discharged (a).

Exceptions  
3. Where original guaranty provides that discharge of principal shall not discharge surety.

*Cowper v. Smith.*

There is a fourth exception to the rule, which is here important only for the purpose of distinguishing it, viz. that, if the principal obtains his discharge by operation of law, the surety is not discharged, e. g., where the principal obtains his discharge in bankruptcy (b), or, under a petition for liquidation, by resolutions in favour of which the creditors voted (c). But where the creditors executed a composition deed by which the principal debtor was released "*in like manner as if he had obtained his discharge in bankruptcy*," it was held that the surety was discharged (d), the reason being that the surety could not in such an event sue the principal debtor.

Where principal discharged by operation of law surety not discharged.

*Secus*: where principal discharged "as if he had obtained his discharge in bankruptcy."

Where the surety is discharged by the action of the creditor in tying his hands against the principal, yet the liability of the surety may be revived by the subsequent assent of the surety to such action (e).

Revival of rights against discharged surety by subsequent assent to dealings with principal.

(a) *Cowper v. Smith*, 4 M. & W. 519; *The Union Bank of Manchester v. Beech*, 13 W. R. 922.

(b) *Brown v. Carr*, 7 Bing. 508.

(c) *Ellis v. Wilmot*, L. R. 10 Ex. 10.

(d) *Cragoe v. Jones*, L. R. 8 Ex. 81.

(e) *Smith v. Winter*, 4 M. & W. 454; and see *Mayhew v. Crickett*, 2 Swanst. 185.

Release  
with  
proviso  
reserving  
remedies  
against  
sureties  
construed  
as covenant  
not to sue.

It should be observed that though a release and a covenant not to sue the principal debtor, standing alone, will alike discharge the surety, yet a reserve of remedies against the surety may be coupled without inconsistency with a covenant not to sue the principal debtor, and will operate (as we have seen) to prevent the discharge of the surety (a), but a reserve of remedies against the surety is repugnant to a *release* of the principal debtor, for by an absolute and unconditional release the debt is extinguished (b), and no right can be reserved against the surety, since "the extinguishment of the debt puts an end to the agreement of principal and surety" (c). Where, therefore, the deed purports to *release* the principal debtor, and also contains a reserve of remedies against the surety, we have the same question of repugnancy as we have already considered in the case of the release of one of two principal debtors with a reserve of remedies against the other (d), but it is now settled that in such a case the release is to be regarded as a *covenant not to sue* (e). Thus, where by a deed of arrangement the creditors *released* the debtor, subject to a proviso reserving their rights against sureties, it was held, that the release operated as a covenant not to sue, and not as an extinguishment of the debt so as to bar the remedy against the surety, notwithstanding that the deed contained an absolute assignment of all the debtor's property to the trustees, and also provisions enabling the trustees to carry

*Bateson v.  
Gosling.*

(a) *Kearsley v. Cole*, 16 M. & W. 128; *Price v. Barker*, 4 E. & B. 760.

(b) *Per Willes, J.*, L. R. 7 C. P. 14, and *cf. ante*, p. 122.

(c) *Per Holroyd, J.*, 4 B. & C. 513; and see *Webb v. Hewitt*, 3 K. & J. 442; *Bateson v. Gosling*, L. R. 7 C. P. 9, 14.

(d) See *ante*, p. 122.

(e) *Bateson v. Gosling, u. s.*

on the trade for the benefit of the estate—on which grounds an attempt had been made to distinguish this from previous cases (a).

There may be cases, however, in which an attempt to reserve rights against the surety would be so utterly inconsistent with the general purport of the agreement, as to be futile. Thus, where an agreement was made between F., a bond debtor, and H., his creditor, whereby—in consideration of the debt and of the agreement by H. to pay a composition of not less than 5s. in the pound to F.'s other creditors, and of a release to be given by H. to F.—F. assigned all his property to H.; and evidence was given that the intention had been to insert in the agreement a reservation of rights against the surety on the bond; it was held by Lord Hatherley (b) that the transaction amounted to a sale, that the debt was gone, and that it would have been impossible on such an agreement to reserve rights against the surety, as such reservation would have been inconsistent with the agreement (c).

Cases where there can be no reserve of remedies against sureties.  
*Webb v. Hewitt.*

Where a creditor accepts a composition from the principal with a reserve of remedies against the surety, he must credit the surety with the sum received from the principal debtor, or such portion of it as represents the debt guaranteed by the surety. Thus, where the defendant guaranteed the plaintiff against debts to be contracted by L. M. to the extent of £400, and L. M. being indebted to the plaintiffs to the amount of £625, paid them a composition of 8s. 7d. in the pound, leaving due to the plaintiffs £356; it was held, in an action

Creditor must credit surety with the amount received from the principal in respect of the portion of the debt guaranteed.  
*Bardwell v. Lydall.*

(a) *Bateson v. Gosling*, L. R. 7 C. P. 9.

(b) *Then Page Wood*, V.C.

(c) *Webb v. Hewitt*, 3 K. & J. 438.

against the defendants on their guaranty, that they were entitled to deduct £171 13s. 4d. (the amount of the composition of 8s. 7d. in the pound on £400) from the amount of their guaranty (a).

Discharge  
of parties  
to Bills of  
Exchange,  
&c.

Some of the cases, which have been referred to in connection with the rights of sureties, were cases which arose with reference to the parties to bills of exchange, or promissory notes; and it is in connection with these instruments that many of the most difficult points arise.

Character  
of parties.

The position of the parties to a bill of exchange is thus stated in Byles on Bills (b): "Where the bill is accepted and indorsed for value, the acceptor is the principal debtor, and all the other parties are sureties for him, liable only on his default. But although all the other parties are, *in respect of the acceptor*, sureties only, they are not as between themselves merely co-sureties, but each prior party is a principal in respect of each subsequent party."

In like manner the maker of a promissory note is the principal debtor and the subsequent parties are sureties.

Taking  
composition  
from  
acceptor  
discharges  
drawer.

Acceptor  
may treat  
bill as paid.

Accordingly, the holder of a bill by taking a composition from the acceptor without a reserve of rights against the drawer will discharge the latter (c). Where the holder takes a composition from the acceptor without reserving his rights against the drawer, the acceptor, in settling his accounts with the drawer, is entitled to treat the bill as fully paid (d).

(a) *Bardwell v. Lydall*, 7 Bing. 489; *Gee v. Pack*, 9 L. T. (N.S.), 290. See also *Cook v. Lister*, 13 C. B. (N.S.), 543.

(b) Byles on Bills,<sup>13</sup> p. 247.

(c) *Ex parte Wilson*, 11 Ves. 410; *Ex parte Smith*, 3 Bro. C. C. 1.

(d) *Stonehouse v. Read*, 3 B. & C. 669.

Where, however, the acceptance of the bill is without consideration, for the accommodation of the drawer, although on the face of the instrument the acceptor is principal and the drawer surety, yet the real position of the parties is the reverse, and the question has frequently arisen, whether the acceptor will be discharged, if the holder abandons his remedies against the drawer. At law it was formerly held, that as between the acceptor and the holder, the position of the parties was determined by the instrument itself, and the acceptor was to be regarded as principal, even although the holder, when he took the note, knew that it was merely an accommodation bill, so that the holder did not discharge the acceptor by foregoing his remedies against the drawer (a).

Character  
of parties  
to accom-  
modation  
bills.

At law.

At equity the rule was otherwise, "and as between the drawer and acceptor and indorsee, with notice, the drawer was principal, and if the indorsee gave time to the drawer that would discharge the acceptor" (b). In *Hollier v. Eyre* (c) (where the plaintiff, who on the face of the instrument appeared as a principal grantor of an annuity, claimed to be only a surety) the equitable doctrine was well explained by Lord Cottenham, who—after laying down the rule that the question whether the plaintiff, *as between himself and the grantee*, was the principal or grantor of the annuity, or only surety for the payment of it by another, *must be ascertained by the terms of the instrument itself*, extraneous evidence being inad-

At equity  
holder who  
with notice  
of real  
character  
of parties  
to accom-  
modation  
bill gives  
time to  
drawer  
discharges  
acceptor.

(a) *Fentum v. Pocock*, 5 Taunt. 192; *Price v. Edmunds*, 10 B. & Cr. 578.

(b) *Ex parte Glendinning*, Buck, 517; cf. *Davies v. Stainbank*, 6 De G. M. & G. 679.

(c) 9 Cl & F. 1.



Lord  
Cottenham.

missible for that purpose—added (a): “But although all the grantors were principals as between them and the grantees, yet as between themselves some of them might be sureties for others; and if it was established that such was the case as between the plaintiff and Lynch, *and that the grantees knew that such was the case*, they might by their dealing with Lynch have raised an equity in favour of the plaintiff, entitling him to the protection of a Court of Equity against the legal consequences of the instruments he joined in executing.”

Immaterial  
whether  
holder took  
with notice  
of the  
position of  
the parties.

It is immaterial whether the holder had notice of the real relation of the parties at the time when he took the bill; the equity arises at the time of his giving time to, or abandoning his remedies against, the real principal, and if, after notice of the real position of the parties, he voluntarily discharges the principal without reserving his remedies against the surety, he will not be allowed to sue the latter (b). This rule of equity was available as an equitable defence at law (c), and since the Judicature Act 1873 (d) it will prevail in all Courts.

Same rule  
applies to  
promissory  
notes made  
without  
considera-  
tion.

Similarly with regard to promissory notes, if the note was made and given to the payee without consideration, and the holder had notice of the absence of consideration, yet at law, formerly, he did not discharge the maker by

(a) 9 Cl. & F. 45.

(b) *Davies v. Stainbank*, 6 De G. M. & G. 679, and *per Coleridge, J.*, thereon in *Hooley v. Harradine*, 5 W. R. 407; *Oakley v. Pasheller*, 4 Cl. & F. 207; *Bailey v. Edwards*, 12 W. R. 337, overruling *Strong v. Foster*, 17 C. B. 201, on this point; *Oriental Financial Corporation v. Overend*, 7 Chy. App. 142, L. R. 7 H. L. 348, overruling *Ex parte Graham*, 5 De G. M. & G. 356.

(c) *Carstairs v. Rolleston*, 5 Taunt. 551; *Nichols v. Norris*, 3 B. & Ad. 41, n.

(d) 36 & 37 Vict. c. 66, sec. 25 (11).

tying his hands against the real principal (a). But the equitable doctrine will now prevail in all Courts (b), and if it appear that one of the makers of a joint and several promissory note was really only a surety for another maker (c), or that the sole maker of a promissory note was only a surety (d), and that the creditor has, after notice of the real character of the parties, given time to or otherwise dealt with the real principal in such a way as to damnify the surety, the latter will be discharged.

Where the relation of principal and surety did not subsist at the time of the original contract, but the two joint debtors subsequently entered into an arrangement between themselves, by which, *inter se*, one of them became principal and the other surety, and the creditor, with knowledge of the arrangement, gave time to the one who had so become principal, it was held that this was no discharge to the other, for the two debtors could not change their position with regard to the creditor without his consent, and so deprive him of the right which he had to treat both as principal debtors (e). But if the creditor has assented to the arrangement, or by his conduct has adopted one of the debtors alone, as principal, and the other as surety only, he would, by abandoning his remedies against the new principal, discharge the surety (f).

Two principal debtors cannot alter their position to that of principal and surety respectively without consent of creditor.  
*Swire v. Redman.*  
Secus if creditor consents.

(a) *Bailey v. Edwards*, 12 W. R. 337; *Ewin v. Lancaster*, 13 W. R. 857; and see cases cited in note to *Rees v. Berrington*, 2 L. C. Eq.<sup>4</sup>, 1007.

(b) 36 & 37 Vict. c. 66, sec. 25 (11).

(c) *Pooley v. Harradine*, 7 E. & B. 431; *Taylor v. Burgess*, 29 L. J. Ex. 7; *Greenough v. McClelland*, 30 L. J. Q. B. 15.

(d) *Smith v. Winter*, 4 M. & W. 454.

(e) *Swire v. Redman*, 1 Q. B. D. 536, disapproving of *Maingay v. Lewis*, 5 Ir. R. C. L. 229.

(f) *Wilson v. Lloyd*, 16 Eq. 60.

II. *Discharge of Surety as affecting Co-sureties.*

There remains to be considered the question how far a creditor, by depriving himself of his remedies against one of several co-sureties, will discharge the others.

This question cannot be considered as settled. It is clear that the unqualified *release* of one discharges the others (a); but, if the release be qualified by a reserve of rights against the others, those rights will not be prejudiced (b). Whether, however, the simple discharge (by any means short of a *release*) of one of several co-sureties would affect the creditor's remedies against the others, must be considered on the authorities as doubtful (c).

(a) *Cheetham v. Ward*, 1 B. & P. 630; *Nicholson v. Revill*, 4 A. & E. 675; cf. *Evans v. Bremridge*, 2 K. & J. 183.

(b) *Thompson v. Lack*, 3 C. B. 540; *Ex parte Carstairs*, Buck, 560; and see 2 L. C. Eq.<sup>4</sup> 1004, and De Collyar on Principal and Surety, p. 315.

(c) See *per* Lord Eldon *Ex parte Gifford*, 6 Ves. 808; and *per* Parke, B., thereon, *Kearsley v. Cole*, 16 M. & W. 136; and *Evans v. Bremridge*, *u. s.*

## CHAPTER XII.

### CREDITORS' AGREEMENTS AS AFFECTING SECURITIES AND REMEDIES AGAINST PERSONS OTHER THAN THE DEBTOR DISCHARGED (*continued*).

#### III. *Securities, &c.*

IN considering how far the discharge of one principal debtor operates to discharge his co-principals or sureties, we saw that the rule in part rested on the right, which a co-principal and a surety have respectively, to claim a *partial* or *complete indemnity* from the debtor released. We have now to consider, how far a creditor by acceding to an arrangement prejudices his right to enforce his securities either (i.) against a particular fund or property, or (ii.) against third persons where the debtor discharged is not the person primarily liable on the security. In these cases there is no right to an indemnity, but they rest solely on the principle, already referred to (a), that a creditor, who ostensibly comes in on the same footing as the other creditors, shall not secure, or retain for himself, any advantage beyond the rest.

The question must, therefore, eventually turn on the

(a) *Ante*, pp 72, 125, and 129.

If the debt is released securities vest in the debtor.

*Stock v. Mawson.*

terms of the agreement. If the creditors release their debts without a reservation of their securities, those securities will become the property of the debtor (a). Accordingly, if a creditor, after taking a composition on a debt, for which he holds bills drawn by the debtor, and releasing the debtor, subsequently sues the acceptors on the bills, the debtor can recover the sums paid by the acceptors as money received to his use (b). The effect of a release in extinguishing securities is pointed out in Sheppard's Touchstone (c). "By a release of all debts, are discharged and released all debts then owing from the releasee to the releasor upon especialties or otherwise, all debts also due upon statutes. And, therefore, if the conusor himself, or his land, be in execution for the debt and he hath such a release, he must be discharged," to which Mr. Preston adds: "For by releasing the debt, the security for the debt is released." This statement of the law was adopted expressly by the Court of Exchequer in *Cowper v. Green* (d), and tacitly by Lord Lyndhurst in *Buck v. Shippam* (e), where he says: "The moment a creditor releases his debt, which he does by executing a deed of this kind, there is, of course, an end of any lien which he may have for it."

Reservation of benefit of securities to be valid must appear on the agree-

Now, as has already been observed in relation to the reserve of remedies against co-debtors and sureties (f), it is a well-established principle, that a creditor cannot ostensibly accept a composition, and sign a deed which expresses his acceptance of the terms, and at the same time

(a) *Cowper v. Green*, 7 M. & W. 633, 641.

(b) *Stock v. Mawson*, 1 Bos. & P. 286, and see *post*, p. 145.

(c) P. 342.

(d) *U. s.*

(e) 1 Phill. 694, 696. See *ante*, p. 27.

(f) See *ante*, pp. 125 and 129.

stipulate for, or secure to himself, a peculiar and separate advantage which is not expressed upon the deed or otherwise made known to the creditors generally (a). Therefore if a creditor acceding to the deed purports to release the debt, he will not be allowed to avail himself of any verbal arrangement made by the debtor with him—or with all the secured creditors—but not known to the creditors generally, that he or all the secured creditors shall retain the benefit of existing securities (b); but on the other hand, although the word release may be used, if it clearly appears *on the face of the deed*, that it was one of the terms of the arrangement, and the intention of all parties, that secured creditors should have the benefit of their securities, the mere use of the word release will not be allowed to defeat this intention (c).

ment or have been known to creditors generally.

*Mawson v. Stock.*

Reservation on face of instrument valid.

In *Squire v. Ford* (d) the creditors covenanted that the deed should operate as a good release of all actions, suits, obligations, debts, duties, *judgments*, extents, executions, claims and demands which they might have against the debtor or his estate or effects for their respective debts, but so that the covenant should not operate on or destroy any mortgage, pledge, lien, or any other specific security which any creditor then possessed in respect of his debt, and it was held, upon the construction of the whole deed, that the general words used had not the effect of releasing a judgment previously obtained and duly registered against the debtor by the plaintiff, who executed the deed, but that the plaintiff was still entitled to the benefit

Judgments (though expressly mentioned) not extinguished by release if securities are reserved.

*Squire v. Ford.*

(a) *Per* Lord Langdale, M.R., *Cullingworth v. Loyd*, 2 Beav. 391, and see *post*, Ch. XIII. pp. 150 *seq.*

(b) *Mawson v. Stock*, 6 Ves. 301.

(c) *Squire v. Ford*, 9 Ha. 47, and see *ante*, p. 122 *seq.*

(d) *U. s.*

of the charge, which he had thereby obtained on the debtor's real estate.

Creditor  
may  
qualify his  
execution  
of the deed  
so as to  
preserve  
securities.

*Duffy v.  
Orr.*

And although the effect of the deed itself would be to release the securities of creditors executing it, a creditor's execution of it may be so *expressly* qualified as to preserve his right of enforcing his securities. Thus in *Duffy v. Orr* (a) A, a creditor of a firm, held securities from one of its members for moneys advanced by him, at different times, to the firm, but claimed a balance beyond what those securities would cover. All the creditors of the firm agreed to accept a composition "of 7s. for every 20s. due to the said creditors respectively." The composition was carried into effect by a deed, which witnessed that the several persons who had subscribed it, being creditors of the firm, covenanted to accept the composition in full discharge and satisfaction of the debts due from the firm or for which they were in any manner responsible, and absolutely released the partner on whose property A held security. A was the first to sign this deed; but added to his signature the words "without prejudice to any securities whatever that I hold." The other creditors signed in their respective order under A's signature. It was held that the composition, thus accepted, did not affect the rights of A upon his previous securities, but only related to the balance beyond the sum they would cover, and that he might afterwards enforce those securities in equity.

*A fortiori*  
where  
securities  
are ex-  
pressly  
released  
they vest  
in debtor.

Since a simple release of the debt operates to extinguish the security, *a fortiori* will the security be extinguished where the creditor purports to release the debtors "from the debt owing from them to him, and also from all securities given by them or either of them for securing

(a) 1 Cl. & Fy. 253; cf. *Lee v. Lockhart*, 3 My. & Cr. 302.

payment of such debt" (a). Therefore, where a creditor who received the composition on his whole debt, in accordance with a verbal stipulation (not communicated to the other creditors) realised his security, and then executed the composition deed, which contained a release in the above terms, it was held that, other creditors having afterwards executed the deed without knowledge of the verbal stipulation, he could not retain the proceeds of his security (a).

*Cullingworth v. Loyd.*

The same principle seems to apply where, though the creditors purport to release their debts, the agreement cannot operate as a release, because it is not under seal, or where it is stated that the creditors accept the composition or dividend in full discharge of their debts, and the instrument is silent as to the rights of secured creditors. Thus, Jessel, M.R., said in *Couldery v. Bartrum* (b): "If the creditors came in and all agreed *inter se* to take 10s. in the pound, the agreement *inter se* supplied the additional consideration which was supposed to be necessary, and the debts were satisfied—so satisfied, that if one of the creditors obtained an unfair advantage, a Court of Equity actually interfered, and allowed the debtor to recover back the surplus from him, because he was not allowed to take from the debtor anything more than the composition. The principle upon which the creditor was made to repay was, that his debt was satisfied, and that he had no right to take an unfair advantage."

The same principle where debt though not released is satisfied.

Jessel, M.R.

There is a case, however, which seems at variance with the position here contended for. The facts in *Thomas v. Courtney* (c) were as follows: The plaintiffs

*Thomas v. Courtney.*

(a) *Cullingworth v. Loyd*, 2 Beav. 385.

(b) 19 Chy. D. 394, at p. 400.

(c) 1 B. & Ald. 1.



*Thomas v.  
Courtney.*

had supplied goods to B. & Son. In March, 1814, the plaintiffs and the other creditors of B. & Son signed an agreement (not under seal) to accept a composition of 12s. in the pound, to be paid by the debtor's promissory notes, and the agreement concluded "and the said creditors shall and will accept the sums secured by such promissory notes in full of all the debts due to them from B. & Son, and release them from all actions and demands from the beginning of the world to the said 31st December last past." On the 31st December, 1813, the debtors owed the plaintiffs £1295, which sum was put opposite their names when they signed the agreement, and they received composition notes (which were duly paid) upon that sum. In the previous November the plaintiffs had received from the debtor a bill of exchange for £200, drawn by B. & Son, and accepted by Col. Gower, which became due and was dishonoured prior to the 31st December, 1813. Subsequently to the composition the plaintiff received payment of this bill from Col. Gower, and the question was, whether the sum so received was money received to the use of B. & Son, or whether the plaintiffs were entitled to retain it in respect of their original debt.

Lord Ellen-  
borough.

The plaintiffs' contention was, that this subsequent payment reduced their original debt to £1095, and they gave credit for the composition that they had received in respect of the other £200. This view was adopted by the Court. Lord Ellenborough, in giving judgment, said: "The manifest intention of the agreement between these parties was, that the plaintiffs were to receive 12s. in the pound on the amount of their debt. The first question is, what was that debt? Originally, and before it was reduced by the payment of Col. Gower's bill it amounted to £1295. That bill was not productive at first; but as

soon as the money due upon it was received, it had the effect of striking out £200 from the amount of the debt, and thereby reduced it to £1095. On that sum 12s. in the pound was to be received, and no more. It is clear, then, that the plaintiffs would have been overpaid if they had retained the 12s. in the pound upon the whole of their debt as it stood originally. But it appears, as far as respects the £200, an allowance has been made by them for that sum in their account." Abbott, J., based his judgment on the ground that there was no clear intention shown in the agreement that all the creditors were to receive equally.

Now it is submitted that by their receipt of the composition on their whole debt, the plaintiffs' whole debt was satisfied and gone as effectually as if it had been released (a). If their debt was gone, then the plaintiffs had no right to have recourse to their securities, which would vest *ipso facto* in the debtor (b), or even if they did not so vest, yet since the acceptances were (as the Court assumed) acceptances for value, the plaintiffs were, by retaining the proceeds of the acceptances, taking from the debtor more than the agreed composition, which would be in fraud of the other creditors.

The case of *Thomas v. Courtnay* (c) may be usefully compared with *Stock v. Mawson* (d). Stock's creditors entered into a deed of composition with him, whereby they agreed to accept a composition of 8s. in the pound, upon their respective debts and in full discharge thereof, and to join in a petition to supersede a commission of bankruptcy

*Stock v.  
Mawson.*

(a) See the remarks of Jessel, M.R., in *Couldery v. Bartrum*, 19 Chy. D. 394, at p. 400, quoted *ante*, p. 143.

(b) *Cowper v. Green*, 7 M. & W. 641.

(c) 1 B. & Ald. 1.

(d) 1 Bos. & P. 286.

which had issued against him. There were two distinct debts owing to Mawson from Stock, for one of which Mawson held bills drawn by Stock, to the full amount. Mawson proved both debts, and received the composition on the whole amount, and then sued the acceptors of the bills, on some of which he recovered 20s. in the pound, of which he claimed to retain 12s. in the pound, but was willing to pay over the balance. Stock claimed to be entitled to the whole amount paid by the acceptors, and brought the action to recover it. The Court (Eyre, C.J., Buller, Heath, and Rooke, JJ.) held, that the intention of the parties was, that the holders of the bills should not receive more than their composition, that they ought to have surrendered to the debtor their securities, and that the plaintiff could recover the sums received on the bills as money received to his use. It is true that Buller, J., based his judgment on a provision of the agreement, by which creditors surrendered to the debtor all "bills" (though the bills in question do not seem to have been within the scope of the provision (a)), and on this ground the case was distinguished in the argument in *Thomas v. Courtnay* (b), but Eyre, C.J., expressly said: "Here a certain liquidated sum is given, and the creditor thinks it for his interest to consider the whole as the debt of the drawer, and to accept 8s. in the pound as a satisfaction; this is the substance of the instrument; by this the debt is discharged and gone, and the effects are absolutely released. Suppose that the plaintiff had paid 20s. in the pound there can be no doubt but that he would have become the purchaser of these bills, and would be entitled to take them out of the hands of the holder and use them accord-

Eyre, C. J.  
Satisfaction of debt vests securities in debtor.

(a) See *per* Lord Eldon, *Mawson v. Stock*, 6 Ves. 304.

(b) 1 B. & Ald. 1, *ante*, p. 143.

ing to the relation in which he might stand to the acceptor. If it be so on payment of 20s. in the pound, can we distinguish the present case from that? The creditor has thought fit to accept 8s. in lieu of 20s., . . . and the discharge is as effectual as if 20s. in money had been paid."

The case of *Thomas v. Courtney* (a) has been distinguished in several cases (b), and seems to stand alone. It was cited in *Bush v. Shipman* (c), where it was held that a secured creditor, who, with notice of the deed, had realised his security could not be allowed to come in under the deed. In that case, it is true, the arrangement was by deed containing a release, but the decision rested, not on the technical effect of a release in extinguishing the debt, but on the ground that it was inconsistent for a creditor, who had already realised his security, to be allowed the benefit of an arrangement which intended a rateable division of the debtor's effects.

The result of the cases seems to be, that if the original debt is *satisfied* by the receipt of the composition, or of the dividend, then a secured creditor cannot retain the benefit of his securities (d), unless his right to do so is expressly reserved. Some difficulty might formerly have been felt, where the security was by specialty, as to how a covenant under seal could be *satisfied* by a parol agreement, but in such a case the agreement for good consideration to accept satisfaction of the debt by substitution of the new

(a) 1 B. & Ald. 1, *ante*, p. 143.

(b) See *Couper v. Green*, 7 M. & W. 633, 639; *Pfleger v. Brown*, 28 Beav. 391, 396.

(c) 14 Sim. 239, on appeal *sub nom. Buck v. Shippam*, 1 Phill. 694, and see *ante*, p. 27. With this case compare *Graham v. Ackroyd*, 10 Ha. 192, and *Broadbent v. Barlow*, 3 D. F. & J. 570; *ante*, pp. 28 *seq.*

(d) See *Couper v. Green*, 7 M. & W. 633, 639.

contract for the old, amounts to an equitable satisfaction; and if it can be clearly gathered from the agreement that the intention was (and there is a presumption of such intention in every case (a)) that all should share equally, it would be a fraud on the other creditors, if a creditor holding security, who was a party to the arrangement, were allowed to enforce his security, although technically it might not have been either *satisfied* or released.

Customary to insert provisos for valuation of securities and proof for balance only.

The foregoing remarks will serve to show how extremely important it is, that the rights of secured creditors under the agreement should be accurately defined *on the face of the agreement*. In practice it is customary to insert a provision as to their right to retain their securities, the provision being usually to the effect that such creditors shall be allowed to retain their security, and come in under the arrangement in respect of the balance only of their debt, after deducting the value of their security, or that if they elect to prove for their whole debt, they must surrender their security—adopting the rule in bankruptcy.

Securities when thus valued remain securities only for, and redeemable at, that value.

Where the creditors by a composition deed release their debts, and it is provided that secured creditors acceding to the arrangement shall have the benefit of their securities, but shall receive the composition under the deed only on the balance after deducting the value of the securities, a secured creditor, after receiving payment of the composition on such balance, retains his security only as a security for the value he has so put upon it (the rest of his debt being discharged by the payment of the composition), and is liable to be redeemed on payment of such value with interest; and if the security is realised in

(a) *Per Parke, B., in Howden v. Simpson*, 10 A. & E. 813.

the market, and produces more than the value set on it, the surplus is the property of the debtor. Thus, where the deed contained the above provisions, a creditor for £229 8s. 5d., who held as security a policy of assurance on the life of the debtor, valued the policy at £16, and received the composition on the balance, viz., £213 8s. 5d. The policy having fallen in after some premiums had been paid by the creditor, it was held, that, after his execution of the deed and receipt of the composition, he remained a creditor only for £16, and that the proceeds of the policy, after payment of £16 and interest, belonged to the debtor's estate, subject to repayment with interest of the premiums which the creditor had paid (a). On principle it would appear that the result will be the same, although the agreement does not operate as a release, wherever the creditors agree to accept the composition, or the dividend payable under the agreement *in satisfaction* of their debts (b).

*Bolton v. Ferro.*

(a) *Bolton v. Ferro*, 14 Chy. D. 171.

(b) And see *per* Jessel, M.R., *Couldery v. Bartrum*, 19 Chy. D. 400, 401; and *cf.* *Société Générale de Paris v. Geen* 8 App. Ca. 606, 615.

## CHAPTER XIII.

SECRET AGREEMENT FOR BENEFIT OF PARTICULAR CREDITOR  
OR CREDITORS.

Secret  
bargain for  
advantage  
over other  
creditors  
void.

ALLUSION has already been made to cases in which a creditor, who purports to come in under a composition arrangement, has stipulated with the debtor that he is to enjoy some advantage over the other creditors; as, however, equality of benefit is the whole basis of these arrangements (a), any such *secret* bargain is a fraud on the other creditors, and has been uniformly declared void.

Macdonald,  
C.B.

"The principle is, that in such cases each must conduct himself openly, and in the manner in which he appears to the world to act. If his conduct is such, as has a natural tendency to induce the other creditors to believe, that all are acting upon equal terms, and receiving equal shares, as they may be influenced by that appearance, any private agreement for greater benefit to one is a fraud upon the rest, and therefore void" (b).

It is on grounds of public policy, and not merely out of compassion for the debtor (since there can be no particular deceit on the debtor, who is party thereto), that

(a) *Per Parke, B., Howden v. Simpson*, 10 A. & E. 813.

(b) *Per Macdonald, C.B., Fawcett v. Gee*, 3 Anstr. 915.

the Court relieves against such bargains (a); and the onus lies on the party alleging fraud to show that the agreement was in fact unknown to the other creditors (b).

Onus of proof lies on party alleging fraud.

The rule applies whatever may be the benefit stipulated for by the creditor, for whether it be the payment to him of a larger composition than is to be paid to the other creditors, or the giving of security for the balance of his debt (c), the retention of existing securities (d), or merely the better securing of the composition itself (e), the case will still be within the principle of the rule, since *whatever be the nature of the secret bargain*, the preferred creditor, by signing the agreement without disclosing that bargain, misleads the other creditors into a situation in which, his own acts show, he thinks it unreasonable they should be placed (f).

The rule applies whatever the nature of the advantage.

This rule has been generally recognized from the earliest times, but it was urged in one case, that unless all the creditors had come in, or there was a proviso avoiding the composition, unless all should come in by a certain time, the presumption of a mutual confidence and implied contract among the creditors, that no one should receive more than another, did not arise, and each creditor had a right to make his own bargain and get the whole of

The fraud consists in pretending to accept the same terms as other creditors.

(a) *Per* Lord Hardwicke in *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 156.

(b) *Davidson v. McGregor*, 8 M. & W. 755; see *ante*, p. 130.

(c) *Middleton v. Onslow*, 1 P. Wms. 768; *Cockshott v. Bennett*, 2 T. R. 763; *Wells v. Girling*, 1 B. & Bing. 447; *Cecil v. Plaistow*, 1 Anstr. 202; *Eastabrook v. Scott*, 3 Ves. 456; *Britten v. Hughes*, 5 Bing. 460; *Jackson v. Lomas*, 4 T. R. 166; *Pfleger v. Browne*, 28 Beav. 391.

(d) *Cullingworth v. Loyd*, 2 Beav. 385; *Stock v. Mawson*, 1 B. & P. 286.

(e) *Leicester v. Rose*, 4 East, 371 (overruling *Feise v. Randall*, 6 T. R. 146); *Ex parte Sadler and Jackson*, 15 Ves. 52.

(f) *Per* Lord Eldon, 15 Ves. 55.



his debt if he could. But this argument did not prevail (a). Every creditor undoubtedly has a right to make his own bargain, and get the whole of his debt if he can; but it is the "pretending to accept the same terms as the other creditors, when the creditor so pretending has secured himself some advantage of which the others are not to partake, which constitutes the fraud on the other creditors" (b); and this fraud is none the less whether it be one creditor or all who are deceived.

The rule applies although negotiations for composition break down.

*Wells v. Girling.*

This rule applies although the negotiations for a composition, in the course of which the fraudulent bargain was made, prove abortive (c). Therefore, where the plaintiff, a creditor of A, offered to induce A's creditors to agree to a composition, on condition of A's giving him a promissory note signed by A and another, as security for a portion of his debt (a transaction that was to be kept secret from the other creditors), and the note was given by A and signed by the defendant, but the plaintiff's endeavours to induce the creditors to accept a composition were unsuccessful, it was held, that the agreement, was void, and the plaintiff could not enforce the note against the defendant (c). Dallas, C.J., said, in giving judgment: "The facts do not leave much doubt as to the fraud of the case. If, then, the agreement is fraudulent, it is void; and *I am at a loss to understand how an agreement void in its creation, can cease to be void from subsequent circumstances*" (d).

Rule applies to a

The rule was held to apply where a creditor con-

(a) *Constantine v. Blache*, 1 Cox, 287.

(b) *Per Best*, C.J., 4 Bing. 224.

(c) *Wells v. Girling*, 1 Br. & Bing. 447 (which must be regarded as overruling the dictum of Lord Mansfield in *Wheelright v. Jackson*, 5 Taunt. 116); and cf. *Alsager v. Spalding*, 4 Bing. N. C. 407, *infra*, p. 160.

(d) 1 Br. & Bing. 453.

sented to become surety for the payment of a composition of 8s. in the pound, in consideration of his receiving the plaintiff's acceptances for the full amount of his own debt; and upon a bill filed by the debtor for an account of certain property, which had been handed over to the creditor-surety to enable him to pay the composition, an account was decreed with a declaration that the defendant was only to be allowed in account the same proportion as other creditors—8s. in the pound (a).

creditor who becomes surety for payment of the composition in consideration of obtaining payment in full.

*Wood v. Barker.*

But, where the creditors agreed by resolution under sec. 126 of the Bankruptcy Act, 1869, to accept a composition payable by three instalments, the third instalment being guaranteed by a surety (who was also a creditor), and, before the resolution was passed, the debtor had agreed with the surety to indemnify him against any liability, which he might incur under his guaranty, by depositing goods with him, although this agreement was not made known to the creditors, it was held that the non-disclosure of this arrangement did not render it an improper transaction, for it was not part of the bargain with the creditors that the assets should be dealt with in any particular way (b).

It is immaterial, for the purpose of this rule, whether the composition agreement was entered into at a meeting of all the creditors assembled for the express purpose, or the agreement was impliedly a common one by the cre-

Mode of inception of composition agreement immaterial.

(a) *Wood v. Barker*, 1 Eq. 139; *cf. Pendlebury v. Walker*, 4 Y. & C. 424.

(b) *Ex parte Burrell, re Robinson*, 1 Chy. D. 537. For a case in which after a composition agreement, the debtor made an assignment of his effects to a surety who had agreed to guarantee part of the composition, to indemnify him against his liability, and a creditor (who had been remitted to his original rights by default in payment of the composition) was held entitled to allege such assignment as an act of Bankruptcy, see *Leake v. Young*, 5 E. & B. 955.

... *Clay v.*  
... *Ray.*

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cited, *ante*, p.

ditors affixing their signatures to the same deed carried round to each separately (a).

Bargain with secured creditors as a body, not known to creditors generally, void.

Where a bargain was made with all the secured creditors as a body, that they should retain their securities, it was held that it was void, it not being known to the creditors generally that this was the footing on which the secured creditors came in under the arrangement (b).

It being thus established that all such bargains are void, it remains to consider the rights and liabilities attendant on securities given in pursuance thereof, and the consequence generally to the parties to such bargains. A comparison of the numerous authorities seems to justify the following conclusions:—

1. Creditor cannot enforce securities obtained thereunder.

I. The creditor cannot enforce such agreement (c), nor can he (or any holder with notice) enforce securities obtained under such bargain (whether obtained from the debtor or a third person) (d); a subsequent promise to pay them is without consideration, and will not sustain an action (e); and the Court will order such securities to be delivered up to the debtor, though he is *particeps criminis* (f).

Securities substituted for the original security invalid.

*Geere v. Mare.*

Not only is the original security incapable of enforcement, but all given in substitution of it will be alike invalid. Thus in *Geere v. Mare* (g), on a composition between the defendant and his creditors, a secret arrangement was made by which the plaintiff was to

(a) *Per Le Blanc, J.*, 4 East, 383.

(b) *Mawson v. Stock*, 6 Ves. 301.

(c) *Jackson v. Lomas*, 4 T. R. 166.

(d) *Coleman v. Waller*, 3 Y. & J. 212; *Wells v. Girling*, 1 Br. & B. 447.

(e) *Cockshott v. Bennett*, 2 T. R. 763; *Constantine v. Blache*, 1 Cox, 287; *Mawson v. Stock*, 6 Ves. 301.

(f) *Jackman v. Mitchell*, 13 Ves. 581.

(g) 2 H. & C. 339.

receive a larger composition than the other creditors, and to carry this arrangement into effect, S., the defendant's brother, accepted a bill for the additional composition, and the plaintiff assigned his debt to S. S. received the composition on the debt, and paid it over to the plaintiff. The bill having been dishonoured, and the plaintiff having threatened legal proceedings, the defendant by deed, reciting that S. was indebted to the plaintiff in the amount of the bill, assigned to the plaintiff a policy of assurance by way of security, covenanting to keep up the assurance, and repay any premium paid by the plaintiff. It was held that the plaintiff could not enforce this covenant.

And, even where the plaintiff, who was a creditor of A., the defendant's son, had obtained judgment and issued execution against the defendant, on two promissory notes, which had been given to the plaintiff (in fraud of other creditors) as the price of his accession to a composition arrangement between A and his creditors, but afterwards agreed to stay execution on receiving (*inter alia*) a guaranty by the defendant, and thereupon gave up the two notes, it was held that the guaranty was tainted with the original fraud, and could not be enforced, *notwithstanding that part of the consideration for it was the giving up a judgment in an action in which the illegality might have been, but was not pleaded* (a).

*Clay v. Ray.*

**II. Where the fraud consists in concealing the amount of the creditor's debt, and accepting a composition on and releasing a portion of it only, the creditor cannot afterwards sue for the portion which he has not released** (b).

2. Creditor who in fraud of other creditors conceals part of his claim cannot afterwards sue for that part.

(a) *Clay v. Ray*, 17 C. B. (N.S.) 188.

(b) *Britten v. Hughes*, 5 Bing. 460; and see cases cited, *ante*, p. 85 *seq.*

3. Creditor party to fraudulent bargain cannot even enforce payment of composition.

*Knight v. Hunt.*

*Howden v. Haigh.*

Agreement not divisible but wholly void.

Parke, B.

**III. Where a composition agreement is tainted by any such fraudulent bargain, the creditor who is party to the fraud cannot enforce even payment of the composition.**

Thus, in *Knight v. Hunt* (a), the plaintiff had refused to sign an agreement to receive a composition of 10s. in the pound, but afterwards consented, on the debtor's brother offering to supply him with coals to the amount of the other 10s.—an arrangement which was not made known to the other creditors. The plaintiff received a promissory note for the composition, and was supplied with coals to the amount agreed on. *Interest was paid on the promissory note*, but the note itself not having been paid, the plaintiff brought an action on it, and it was held he could not recover.

The case of *Howden v. Haigh* (b) is even stronger, for there it was held that the plaintiff, who had agreed to accept payment of his debt by instalments, but, to obtain an advantage over the other creditors, had secretly bargained for the indorsement to him by the defendant of a bill accepted by a third party, could not succeed in an action for the instalments, *although he had not enforced or received payment of the acceptance, which had become due*. The Court held that the transaction was not divisible, but wholly void (c). This case was doubted by Alderson, B., in *Davidson v. McGregor* (d), but was regarded as sound in *Higgins v. Pitt* (e), and Parke, B., there explained it: "If the additional benefit had been actually given, to allow the

(a) 5 Bing. 432.

(b) 11 A. & E. 1033.

(c) Littledale, J., in this case suggested (p. 1039) the possibility that the plaintiff might be entitled to sue for his original debt, but it was not necessary to decide the point.

(d) 8 M. & W. 755.

(e) 4 Exch. 312, 324.

plaintiff to recover the amount of the composition, would be to have given him more than the rest of the creditors; and the validity of the agreement could not depend on the contingency, whether the additional benefit was actually received or not (a), the principle of these decisions being, not that a party is not to be permitted to recover more than others, but that every secret bargain is a fraud on the creditors, and is void when it is made, and being executory cannot be enforced even against a fraudulent party; and where a part is fraudulent, the bargain, being an entire thing, is altogether fraudulent and void."

IV. Conversely, if the debtor requires the aid of the Court to enforce the terms of the composition agreement against a creditor who has made such a fraudulent bargain, the latter, though he has had the benefit of the bargain, may resist enforcement of the agreement by relying on the fraud (b).

Therefore, where a creditor (who by a secret bargain had stipulated for an advantage over other creditors) entered into a composition agreement with his debtor, by which he covenanted to take a composition and indemnify the debtor against certain bills accepted by the debtor, which were in his hands, and afterwards, claims having been made against the debtor on these bills by third persons to whom they had been endorsed, the creditor failed to indemnify him, it was held that the debtor could not enforce the covenant for indemnity—which was part of the fraudulent and void agreement, and which, but for that agreement, would not have existed—any more than the creditor

4. The debtor cannot enforce the terms of the composition agreement against the creditor.

*Higgins v. Pitt.*

(a) Cf. also the *ratio decidendi* of *Wells v. Girling*, 1 Br. & B. 447, per Dallas, C.J., ante, p. 152.

(b) *Higgins v. Pitt*, 4 Exch. 312.

could sue on the other covenant, both being tainted with fraud (a).

*Mallalieu  
v. Hodgson.*

There is a curious case (b) in which the debtors indirectly obtained the benefit of an indemnity. The facts were as follows: The defendants proposed a composition of 6s. 8d. in the pound to their creditors, which was accepted by the majority of the creditors, but the plaintiff refused to concur unless he received 13s. 4d. on a portion of his debt and the remainder in full, and upon receiving notes for this amount and the positive assurance of the defendants (which was, however, untrue) that no other creditor than himself was preferred and that no one of them was to receive more than the 6s. 8d., he executed the composition-deed, which contained a release of his whole debt. At the time of the execution of the deed, there were outstanding bills drawn by the plaintiff and payable to his order, which the defendants had accepted in payment of the debt so released. The plaintiff, after the release, omitted to take up these bills, and the defendants, being threatened with proceedings by the holders, gave the plaintiff their promissory notes in order that he might provide funds to meet the bills. The plaintiff sued the defendants upon these notes, and they pleaded the facts. It was held that the facts showed no valid consideration for the notes, since the plaintiff, when he received the notes, was already bound to take up the bills, and that the defendants might allege this duty against him, though it arose out of a transaction which was a fraud upon other parties.

5. Debtor

**V. If, under any such bargain, the debtor pays**

(a) *Higgins v. Pitt*, 4 Exch. 312, and see *per Parke, B., ib. p. 325, ante*, p. 156.

(b) *Mallalieu v. Hodgson*, 16 Q. B. 689; see also *Ex parte Oliver*, 4 De G. & Sm. 354.



the creditor a sum of money to purchase his assent to the composition, or gives him a negotiable security, which the debtor is afterwards compelled to pay to third persons, he may recover from the creditors the sums so paid (a). A third person liable on the security so given, who has been compelled to pay it, has the like remedy against the creditor (b).

can recover sums paid under such bargain for creditors' consent.

Some of the propositions enunciated above have been much discussed, but they seem now to be satisfactorily established. It was formerly urged that, although the contract was illegal, money paid thereunder could not be recovered—*quod fieri non debet factum valet*; that in the first place the parties were, at all events, *in pari delicto*, and, therefore, neither ought to have the assistance of the law against the other; and secondly, that as the payment of the money could have been resisted on the ground of the fraud, if that defence had not been resorted to, the payment must be taken to have been voluntary. But Lord Ellenborough answered the first of these objections very forcibly (c): "This is not a case of *par delictum*: it is oppression on one side and submission on the other: it can never be predicated as *par delictum* where one holds the rod and the other bows to it. There was an inequality of situation between these parties: one was creditor, the other debtor, who was driven to comply with the terms which the former chose to enforce." There being such inequality of situation, payments made under such

Lord Ellenborough.

Payments not voluntary.

(a) *Smith v. Cuff*, 6 M. & S. 160; *Horton v. Riley*, 11 M. & W. 492. The dicta of Lord Ellenborough in the former case were doubted by Parke, B., in *Higgins v. Pitt*, 4 Exch. 325, but this doubt was overruled in *Atkinson v. Denby*, 6 H. & N. 778, on appeal, 7 H. & N. 934.

(b) *Smith v. Bromley*. Doug. 696, n.

(c) 6 M. & S. 165.

circumstances can no longer be regarded as made voluntarily, but under coercion (a).

*Atkinson v. Denby.*

The facts in *Atkinson v. Denby* (b) were as follows: The plaintiff, being indebted to the defendant and others, offered a composition of 5s. in the pound. The defendant at first refused to accept less than 20s. in the pound, but ultimately agreed to accept the composition, the plaintiff agreeing (in fraud of the other creditors) to give him a bill of exchange for £108 and £50 in cash. The bill of exchange and the cash were given accordingly, and the defendant signed the composition deed. The composition was paid to the defendant and the other creditors. The plaintiff then brought an action to recover the £50, and it was held by the Court of Exchequer (Pollock, C.B., Bramwell and Wilde, BB.; *dissent.*: Martin, B.) that he was entitled to recover; and this judgment was affirmed in the Exchequer Chamber (c).

Such sums may be recovered even although composition not paid.

*Alsager v. Spalding.*

In *Alsager v. Spalding* (d), the defendants were creditors of D., and held as security a policy of assurance effected by D. D. offered to pay to his creditors a composition of 8s in the pound, which the defendants refused to accept, unless D. assigned the policy to them. D. accordingly did so, and they executed the composition deed. D. having afterwards become bankrupt, it was held that his assignees were entitled to recover the sums received by the defendants on the policy *although the composition had never been paid* (e).

*Secus:* where payments

Where, however, coercion is no longer present, the payment is voluntary, and can no longer be recovered. This is

(a) See *per* Bramwell, B., *Atkinson v. Denby*, 6 H. & N. 788.

(b) 6 H. & N. 778.

(c) 7 H. & N. 934.

(d) 4 Bing. N. C. 407.

(e) *Cf.* *Wells v. Girling*, 1 B. & B. 447, *ante*, p. 152.

illustrated by *Wilson v. Ray* (a). The defendant, a creditor of the plaintiff, refused to sign the composition-deed unless he were paid in full, and the plaintiff, in order to obtain his signature, accepted a bill of exchange, drawn for this purpose by P., the defendant's clerk, for the difference between the amount of the composition and of the defendant's debt; the defendant then signed the deed. The bill was not honoured when due, but on subsequent application the plaintiff paid the amount to P., and the defendant received the money. It was held that this was a voluntary payment, and the plaintiff could not recover the sum so paid. "The plaintiff," it was said, "might have refused payment, and if the defendant's agent, the drawer, had brought his action on the acceptance, he had the opportunity of defending himself by the illegal nature of the consideration. He waived the advantage, and voluntarily paid the bills with full knowledge of all the facts (b)."

were really  
voluntary,  
coercion  
being no  
longer  
present.

*Wilson v.  
Ray.*

It is submitted that if the suggestion of the fraudulent arrangement clearly proceeded from the debtor, who was at the time desirous of preferring the creditor, and no pressure (*e.g.*, by refusing to come in except on the terms of getting a preference) was put upon him by the creditor, then, as all presumption of coercion would be rebutted, the payments (even though made before the creditor signed) could not be regarded as otherwise than voluntary, and the debtor could not afterwards recover them.

In a recent case, however, Hall, V.C., declined to regard as voluntary, payments made by a debtor to a

*Re Lenz-  
berg's  
Policy.*

(a) 10 A. & E. 82.

(b) And *cf. per* Lord Abinger, *Bradshaw v. Bradshaw*, 9 M. & W. 35; and *Gibson v. Bruce*, 5 M. & Gr. 399; but see *contra*, *Clay v. Ray*, 17 C. B. (N.S.) 188, *ante*, p. 155.

particular creditor, subsequently to a composition, in pursuance of a fraudulent bargain with that creditor, and refused to vary the certificate of the Chief Clerk, who, in taking the account between the parties had credited the debtor with these sums as payments made on behalf of the creditor (a).

Debtor cannot recover sums paid by third person under such agreement.

*Bradshaw v. Bradshaw.*

Where the plaintiff offered a composition of 10s. in the pound, which was accepted by the creditors other than the defendant, who refused to come in unless he were paid the additional sum of 2s. in the pound, and the person who conducted the negotiation on behalf of the plaintiff, gave a cheque for the 2s. in the pound (drawn by W., the plaintiff's father-in-law, without the plaintiff's knowledge) to the defendant, who thereupon signed the agreement (which contained an absolute release) and received the plaintiff's acceptances for the 10s. composition, it was held that the plaintiff could not recover the amount paid by W. as money received to his use; but a suggestion was thrown out that if it were shown that the plaintiff had paid the acceptances to *bonâ-fide holders* out of *his own funds*, he might recover back from the defendant the excess received by him beyond the amount of the composition (b).

6. Creditor who has received amount of composition under fraudulent agreement will not be allowed to take advantage of debtor's default.

VI. If the release in the composition-deed is subject to a proviso avoiding it in the event of non-payment of any of the instalments, a creditor who, under a secret arrangement has received more than the amount of the composition payable under the deed, will not be remitted to his original rights by default of the debtor in payment (c).

(a) *Re Lenzberg's Policy*, 7 Chy. D. 650.

(b) *Bradshaw v. Bradshaw*, 9 M. & W. 29.

(c) *Ex parte Oliver*, 4 De G. & Sm. 354.

The question has been raised, but not decided, whether a creditor, who has made a secret fraudulent bargain, though he has not enforced it, can take advantage of the debtor's default in payment of the composition (a).

Where a creditor agreed to a composition on the understanding that he was to have a secret advantage over other creditors, it was held that he could not claim to be remitted to his original rights, on the ground that the debtor had falsely represented that he was the only creditor who was obtaining a preference (b).

On a bill filed by a debtor to restrain an action brought against him by his solicitor, it appeared that the debtor had entered into a composition by deed with his creditors, one of whom was his solicitor, and that there had been a secret agreement with the latter that he should, notwithstanding, receive payment of his debt in full. Knight Bruce, V.C., held that it was the duty of the solicitor to inform his client both that the release contained in the deed was effectual notwithstanding such agreement, and that the position of the debtor with regard to the solicitor might be prejudiced by his omission to conform strictly to the terms of the deed, as such an omission would revive the solicitor's claim; and since it appeared that no such information had been given, he held that the solicitor could not be allowed to take advantage of the omission on the debtor's part, which would be taking advantage of his own wrong (c).

*Watts v. Hyde.*

Solicitor party to secret bargain not allowed to take advantage of client's default under composition agreement.

**VII. There is nothing to prevent a debtor, who has compounded with his creditors, subsequently**

7. Voluntary payment of

(a) *Howden v. Haigh*, 11 A. & E. 1033, per Little Dale, J., p. 1039; ante, p. 156.

(b) *Mallalieu v. Hodgson*, 16 Q. B. 689.

(c) *Watts v. Hyde*, 2 Coll. C. C. 368.

debt after composition, not under prior arrangement, valid.

Securities for balance of debt, given subsequently and voluntarily, valid.

*Took v. Tuck.*

But not enforceable unless under seal or for good consideration.

paying any particular creditor in full, and if he, after the composition, *not under any prior arrangement*, but voluntarily, gives such a creditor a security for the balance of his debt, that security may be enforced (a).

Accordingly, where M. J., with the defendant's other creditors, agreed to accept a composition and released her debt and the plaintiffs, as trustees for M. J., two years afterwards received a bond as security for the balance of M. J.'s debt after deducting the amount of the composition, and there was nothing to connect the giving of the bond with any arrangement at the time of the composition, it was held that the bond could be enforced (b). Best, C.J., in giving judgment, said, "It is the pretending to accept the same terms as the other creditors, and so encouraging them to come into the arrangement, when the party so pretending *has at the time* secured to himself some advantage, of which the others are not to partake, which constitutes the fraud on the other creditors. There is no deceit of this kind in the present case."

But where the debt is released or satisfied by the agreement, and afterwards the debtor gives the creditor to whom it was owing a security, *not under seal*, for the amount, the debtor may resist the enforcement of such security as *nudum pactum* for want of consideration (c), and an agreement, not by deed, to pay a satisfied debt cannot stand unless for a valuable consideration beyond the mere release of the debt (d), but if it is supported

(a) *Per* Lord Kenyon, *Cockshott v. Bennett*, 2 T. R. 765.

(b) *Took v. Tuck*, 4 Bing. 224; affirmed in error, 9 B. & C. 437.

(c) *Ex parte Hall*, 1 Deac. 171.

(d) *Per* Knight Bruce, V.C., *Watts v. Hyde*, 2 Coll. C. C. 368, 377.

by a good consideration, such a parol agreement may stand (a).

Since on the release of his debt the creditor loses (in the absence of express stipulation) his right to retain a security for that debt deposited with him by the debtor, the relinquishment of such a security will not afford any consideration for a parol promise by the debtor to pay the residue of the debt beyond the amount of the agreed composition (b).

(a) *Cf. Jakeman v. Cook*, 4 Ex. D. 26, but *Ex parte Barrow, re Andrews*, 18 Chy. Div. 465, *contra*.

(b) *Cowper v. Green*, 7 M. & W. 633.

## CHAPTER XIV.

## DUTIES, POWERS, AND LIABILITIES OF TRUSTEES.

*I. Duties and Powers of Trustees.*

1. Duties and Powers. THE main duty of the trustee of a Creditors' Deed is to collect and realise the assets assigned to him, and distribute them among the creditors entitled to receive a dividend. It will be necessary, therefore, to consider—

Distribution of trust fund. (i.) What creditors are entitled to be admitted to participate in the distribution, and what are the duties of the trustee with reference to their admission, and to the distribution of the fund.

(ii.) The amount of the debts upon which a dividend is to be paid and the order in which they are payable, and,

(iii.) What creditors (if any) are entitled to interest, and for what period.

(i.) *What creditors are entitled to be admitted; and the duties of the trustee as to their admission.*

To be entitled to admission: The principles by which the creditors entitled to the benefit of the trust are to be ascertained were considered in previous chapters (a); it may be useful, however, in the present place, briefly to summarise the result of our former inquiry, which may be done as follows:—

(a) Chaps. II. and III., *ante*, pp. 11 and 18.



*(a) Mode of accession (a).*

A creditor *need not* execute (b):

Creditor  
need not,  
must not,

He *must not* have acted contrary to the provisions of the arrangement (c), or set up a title adverse to the deed (d):

He *must* do some act amounting to acquiescence, so as to bind himself to its provisions, and put himself in the same situation, with regard to the debtor, as if he had signed (e). Standing by with notice of the deed, without any active assent thereto, will not be sufficient (f) unless, perhaps, in a case where the creditor has thereby lost his legal remedy (g). must.

*(β) Time for accession (h).*

In the absence of any express provision on the point in the instrument, no creditor can be allowed to accede after the debtor's death (i), nor after a receiving order has been made against the debtor's estate, or he has become bankrupt (j).

Although a time is fixed by the deed within which

(a) See also *ante*, Ch. II., p. 11, *seq.*

(b) *Field v. Donoughmore*, 1 Dr. & War. 228, and *cf. Biron v. Mount*, 24 Beav. 649; *Raworth v. Parker*, 2 K. & J. 169. *Forbes v. Limond*, 4 D. M. & G. 298.

(c) *Field v. Donoughmore*, *u. s.*

(d) *Bush v. Shipman*, 14 Sim. 239; *Watson v. Knight*, 19 Beav. 369; *Brandling v. Plummer*, 27 L. J. Chy. 188.

(e) *Forbes v. Limond*, 4 De G. M. & G. 298; *Whitmore v. Turquand*, 3 D. F. & J. 107, 109; and *per* Lord Lyndhurst, *Re Marshall*, De Gex, 291.

(f) *Biron v. Mount*, 24 Beav. 649.

(g) *Nicholson v. Tutin*, 2 K. & J. 18, 23.

(h) See also *ante*, Ch. III., p. 18, *seq.*

(i) *Lane v. Husband*, 14 Sim. 656.

(j) *Biron v. Mount*, 24 Beav. 642; *cf. per* Page Wood, V.C., *Whitmore v. Turquand*, 1 J. & H. 452.

creditors are to accede, the trustees will be justified, after such time has elapsed, in admitting creditors who have neither assented to nor dissented from the agreement, so long as the position of the parties remains unchanged (a). *A fortiori*, if trustees have a discretion to enlarge the time for accession, they ought to exercise it in favour of a person who (though desirous of acceding) was prevented by difficulty of communication or otherwise from doing so within the time limited by the deed (b). But it would seem that the trustees, unless a discretion as to admitting creditors after the date fixed were reposed in them, would not be justified in so admitting creditors who had actively refused to come in under or assent to the deed within the time limited, and who did not retract such refusal within that time (c).

A creditor who delays to come in within the time limited will not be allowed to disturb a dividend already paid (d).

Trustees  
not per-  
sonally  
liable to  
creditor  
of whom  
claim they  
had no  
notice at  
time of dis-  
tribution.

In a case at *nil prius*, where an action was brought against the trustees of the estate of an insolvent banking firm, to recover a sum of money paid to the firm under a mistake of fact, Lord Kenyon, on the case being opened, asked if the defendants had made a final dividend of the insolvent estate, as in that case, he said, he would not allow the dividends to be disturbed, or the trustees to be charged out of their own estate (e). Exception has been

(a) *French v. Kent*, 1 Vern. 280, 318; *Apollonides v. Atoklides*, 41, Casp. 102; *Whitmore v. Turquand*, 1 J. & H. 444; 3 D. F. & J. 107.

(b) *Roworth v. Parker*, 2 K. & J. 163.

(c) *Johnson v. Kernham*, 1 D. G. & Sm. 260; *Watson v. Knight*, 19 Beav. 380.

(d) *Broadbent v. Thompson*, 4 D. G. & S. 65.

(e) *Pryall v. Clerk*, 1 Esp. 447.

taken to this dictum (a), but it seems to be quite justified, if it is remembered, that the right of the plaintiffs was—not to follow a particular sum which could be *earmarked*—but to recover a *like* sum; in fact, if they established their case, they would only become creditors for the sum claimed, and had no lien on the assets, and therefore, if the trustees had divided the assets before they received notice of this claim, the plaintiffs were not entitled to disturb such dividend (b), or to treat the trustees as personally liable.

It is the duty of trustees of an assignment for the benefit of creditors, before allowing a creditor to sign, to ascertain the validity of his claim, and, if necessary, to contest it, if they regard it as doubtful; but when the deed has been executed by a creditor, he becomes a *cestui que trust*, and the trustees cannot afterwards dispute his right except in an action to rectify the deed (c). Accordingly, where trustees allowed a creditor to execute the deed, and afterwards refused to pay a dividend to him, but required him to substantiate his claim by further evidence, offering to refer the matter to arbitration, to which the creditor declined to agree, the trustees were ordered, in a suit instituted by the creditor on behalf of all the creditors, for the performance of the trusts and for accounts, to pay personally the costs of the suit, so far as occasioned by their contesting the plaintiff's debt (d).

Trustees of an assignment should ascertain validity of claim before admitting creditor.

*Lancaster v. Elce.*

If the trustees admit a creditor who has repudiated the deed and acted contrary to its terms, the other creditors will not be bound by their act (e).

Improper admission of creditor.

(a) *Forsyth on Composition*,<sup>2</sup> p. 80.

(b) *Cf. Broadbent v. Thornton, u. s.*

(c) *Per Lord Romilly, Lancaster v. Elce*, 31 Beav. 328.

(d) *Lancaster v. Elce, u. s.*

(e) *Field v. Donoughmore*, 1 Dr. & War. 227.

Power of the Court to interfere where trustees have a discretion as to admission of creditors.

*Cosser v. Radford.*

*Coles v. Turner.*

In some cases the trustees are given an absolute discretion to admit or exclude any creditors they think fit. In such a case it would seem that the Court cannot interfere (a), unless the trustees have acted *malâ fide* (b), or absolutely refuse to exercise their discretion (c); but the Courts will, if the discretion given is not absolute, endeavour to protect the rights of the creditors (d): and therefore, if the trustee have a power of *selection*, but not an express power of *exclusion*, the Court can interfere and enforce the execution of the trusts at the instance of a creditor who is within the terms of the trust (e); and a clause, providing that "it shall be lawful for the trustees to require any persons claiming to be creditors (notwithstanding that they might have executed the deed, and that the amount, or alleged amount, of their debts might have been inserted in the schedule thereto) to verify the nature and amount of such debt or claim, by statutory declaration or otherwise, as the trustees might think fit," does not give the trustees an absolute discretion or power of exclusion (f).

Unless otherwise provided, a deed of trust for the payment of debts extends only to debts contracted at the time of the execution of the deed (g).

(a) *Wain v. Earl of Egmont*, 3 My. & K. 445; *Drever v. Mawdesley*, 16 Sim. 511.

(b) *French v. Davidson*, 3 Mad. 402; *Cosser v. Radford*, 1 D. J. & S. 585, *per* Knight Bruce, L.J.

(c) *Wain v. Earl of Egmont*, *u. s.*

(d) *Cosser v. Radford*, 1 D. J. & S. 585.

(e) *Ibid.*; and see *ante*, p. 101, *seq.*

(f) *Coles v. Turner*, L. R. 1 C. P. 373.

(g) *Purefoy v. Purefoy*, 1 Vern. 28.

- (ii.) *The amount of the debts upon which a dividend is to be paid, and the order in which they are payable.* 2. Amount of debts.

It has been already seen, that if a creditor accedes to a composition, he is taken (unless there is an express stipulation to the contrary, appearing on the deed, or known to the other creditors) to have acceded in respect of his whole debt, and will be entitled to receive a dividend upon the whole (a).

The rights and position of mortgagees, or other secured creditors, have also been already considered (b). In the absence of any provision as to the manner in which securities are to be dealt with, a creditor who executes a deed by which he releases his debt, will thereby abandon his security, but will be entitled to receive a dividend on the whole of his debt (c).

The order in which the debts are to be discharged, is usually provided for by the deed itself. Order in which debts payable.

Where property was assigned on trust for sale, with a declaration that the proceeds of sale should be applied by the trustee in satisfaction and discharge of the several debts mentioned in the schedule, "according to the priority, nature, and specialty, of such debts respectively," it was held that a bond debt mentioned in the schedule, with interest (not exceeding in all the penalty of the bond), was payable in priority to a simple contract debt mentioned in the schedule (d). *Passingham v. Selby.*

But, where there is no express provision, the funds in Specialty

(a) *Holmer v. Viner*, 1 Esp. 132; *Graham v. Ackroyd*, 10 Ha. 201; and see *ante*, pp. 85 *seq.*, and 89 *seq.*

(b) *Ante*, Ch. XII.

(c) *Cullingworth v. Loyd*, 2 Beav. 385.

(d) *Passingham v. Selby*, 2 Coll. C. C. 405.

not pre-  
ferred to  
simple con-  
tract debts.

the trustee's hands will be divisible among the acceding creditors *rateably, no preference being given to specialty* over simple contract debts (a).

Where an assignment is made for the benefit of creditors, those creditors who have received dividends out of the property assigned are, in the absence of any stipulation to the contrary, entitled to any unclaimed dividends in the hands of the trustees, in preference to the trustees (b).

3. Payment  
of interest.

(iii.) *The Payment of Interest.*

Not pay-  
able on  
simple  
contract  
debts with-  
out express  
direction.

The mere direction by deed to pay a debt does not imply either contract, or trust, to pay interest upon debts by simple contract (c); and a trust by deed, for the payment of debts, does not convert those debts into specialty debts, so as to make them carry interest (d), even although the creditors are parties to and execute the deed (e).

What does  
not amount  
to direc-  
tion.

Of course, if the deed contain express directions for payment of interest on the simple contract debts, it will be payable; but a trust for payment of certain "sums borrowed at interest, and all other such sums as the testator at the time of his death should owe by mortgage, bond, or other specialty, or by simple contracts, or otherwise howsoever, and *all interest thereof*," was held not to entitle a creditor by simple contract to interest (f).

*Tait v.*  
*Lord*  
*Northwick.*

Creditors  
allowed  
interest in

Where there has been wrongful delay in payment, or withholding of payment, a creditor on a simple contract debt

(a) *Hamilton v. Houghton*, 2 Bligh, 187; *Child v. Stephens*, 1 Vern. 101.

(b) *Wild v. Banning*, 2 Eq. 577.

(c) *Hamilton v. Houghton*, u. s. p. 186.

(d) *Stone v. Van Heythuysen*, Kay, 721.

(e) *Clowes v. Waters*, 16 Jur. 632.

(f) *Tait v. Lord Northwick*, 4 Ves. 818.

may become entitled to interest through such delay (a). Accordingly, where two partners executed a trust deed, for the benefit of the joint creditors of the firm and of the separate creditors of one of them, and it was declared that the joint creditors should be paid within a year after the execution of the deed, and that the surplus of the joint estate, after payment of the joint creditors, should be applied for the benefit of the separate creditors; and joint estate, sufficient to pay the joint creditors, was got in within the year, but in consequence of difficulties in relation to the separate creditors, the trustees made no distribution of the funds, and instituted a suit for the execution of the trusts, and invested the funds; it was held, when the Court distributed the fund, that the joint creditors were entitled to interest at 4 per cent. on their debts (b).

consequence of delay.

*Pearce v. Slocombe.*

Where specialty creditors came in with simple contract creditors under a composition deed, by which the debtor's property was to be divided among the creditors, "rateably in proportion to the amount of their respective debts," and the creditors purported by the deed to release their debts *without reservation of the benefit of any security*, it was held that specialty creditors were entitled to receive a dividend on the amount of the interest calculated down to the time of payment (c). Bond creditors, however, are not entitled to prove for more than the penalties on their bonds (d).

Time during which interest is allowed.

Payments made on account of interest are liable to deductions for income tax (e).

(a) *Meredith v. Bowen*, 1 Keen, 270.

(b) *Pearce v. Slocombe*, 3 Y. & C. 84, which must be taken as overruling *Shirley v. Ferrers*, 1 B. C. C. 41.

(c) *Bateman v. Margerison*, 16 Beav. 477.

(d) *Clowes v. Waters*, 16 Jur. 632; cf. *Passingham v. Selby*, 2 Coll. C. C. 405.

(e) *Crane v. Kilpin*, 6 Eq. 334.

Liabilities  
of Trustees.II. *Liabilities of Trustees.*1. Attach-  
ing to  
property.(i.) *Liabilities attaching to property.**Leaseholds.*<sup>11</sup> *hite v.*  
*Hunt.*

It was formerly held (in analogy to the law at the time with regard to assignees in Bankruptcy) that trustees, under a deed of assignment of a debtor's property for the benefit of his creditors, although they had executed the deed, were not bound to take anything which they might consider injurious to the creditors, and therefore, that a lease did not vest in them until acceptance (a). This decision, however, after being much doubted (b), has now finally been overruled, and it was held, that on an assignment by a debtor for the benefit of his creditors of "all his goods, chattels, and personal estate," to a trustee who executed the deed, a lease passed to the trustee, and he was rendered liable as assignee for rent (c). Where, therefore, it is doubtful whether there is any value attaching to the debtor's interest in leasehold premises, it is advisable to exclude them from the assignment.

Where, however, the leaseholds have been included in the assignment, the trustee's liability is limited to breaches of covenant which occur during his tenure, and he may get rid of liability, except as to past breaches, by assignment over, which may be made even to a pauper (d).

2. Lia-  
bility to  
account to  
their *cestuis*  
*que trust.*(ii.) *Liability to account to their cestuis que trustent—  
whether the creditors or the debtor.*

If property is assigned to the trustee, he will be liable,

(a) *Carter v. Warne*, Moo. & Mal. 479.

(b) *How v. Kennett*, 3 A. & E. 659.

(c) *White v. Hunt*, L. R. 6 Ex. 32.

(d) *Valliant v. Dodomedes*, 2 Atk. 546; *I.e. Keux v. Nash*, 2 Stra. 1221; *Taylor v. Shum*, 1 Bos. & Pul. 21; *Onslow v. Corrie*, 2 Madd. 330.



if it is lost to the creditors owing to his negligence in leaving it in the control of the debtor (a); and, even though the property is not actually vested in him, yet, an inspector, acting under the ordinary provisions of an inspectorship deed (which give him practical dominion over the debtor's property), may be accountable as a trustee to the creditors (b).

Property  
lost.

In *Coppard v. Allen* (c), on an appeal from a decree made by Stuart, V.C. (d), for an account against the defendant, who had acted as inspector, Turner, L.J., said, in giving judgment: "Upon the argument of the appeal it was first objected to the decree that the appellant was inspector merely, and not trustee, and that, therefore, no such account, as directed by the decree, ought to have been directed against him, and various provisions of the deed were referred to as showing, that the property was meant to be, and was, left under the management and control of Gates, the debtor, and was not assigned to, or vested in, the inspectors. But, without going fully into the provisions of the deed, many of which indicate, that at least after the lapse of two years from its date, the property was intended to be, and was, put entirely under the control and management of the trustees, it is, I think, sufficient to say, that the property was by the deed clearly bound by a trust for the benefit of the creditors, and that the defendant Allen has so acted, as that he must be taken to have assumed the trust, and must therefore be accountable as trustee."

Liability of  
inspectors  
for pro-  
perty lost.

*Coppard v.*  
*Allen.*

Turner,  
L.J.

The liability of inspectors and managers, for sums

Liability of  
inspectors  
for sums

(a) *Ex parte Ogle, re Pilling*, 8 Chy. 711.

(b) *Coppard v. Allen*, 33 L. J. Chy. 475.

(c) *U. s.*

(d) 9 L. T. (N.S.) 797.

received by  
debtor in  
carrying  
on the  
business.

Lord  
Romilly,  
M.R.

received by the debtor, was carefully considered by Lord Romilly, M.R. (a), and his conclusion was as follows : “Independently of any fraud or misconduct, their liability is confined to accounting for all moneys received by them, or by their order, or for their use. What sums will come under this description, will depend on the powers of the inspectors. If they have the exclusive management and control of the whole establishment, if all the subordinate managers, workmen, and servants were appointed by them, and were removable at their pleasure, then, I think, that money paid to the cashier, or to any person in the establishment in the ordinary course of business, would be money paid for their use, for which they would be accountable.

“If, on the other hand, the original debtor, whose business it had been at the time when the inspectors were appointed, was, by arrangement between the creditors, the inspectors, and himself, to be continued to manage the business, and if he could not be removed by the inspectors without some new arrangement, then, I think, the inspectors would only be liable for the sums actually paid to them, or to some agent of theirs (assuming always that there was no misconduct on their part) : that the original debtor who so continued to act in the management of the business would not be their agent, and that they would not be liable for moneys received, and misapplied, by him. In all cases it must, I think, depend on the contract by which the inspectors were appointed.”

*Chaplin v.*  
*Young,*  
No. 1.

In accordance with the view thus expressed, Lord Romilly, after deciding that under the inspectorship deed in the case before him (a) the inspectors had no power to remove the debtor from the management of the busi-

(a) *Chaplin v. Young*, No. 1, 33 Beav. 330.

ness, held, that the inspectors could not be charged with sums received by the debtor, and not paid over by him to them.

Where, by a creditors' deed (which contained a covenant by the debtor to assign his property to the inspectors at their request but no actual assignment), it was provided that the debtor should carry on his business under the supervision of the inspectors, and the debtor covenanted that he would allow C., "who is intended by the inspectors to be employed as an accountant, or such other person in lieu of C., as the inspectors might from time to time appoint," to collect and receive moneys due to the debtor, and pay the same into a bank, it was held, on a bill for an account filed against the inspectors by the debtor, after the creditors had been paid in full, that C. was not the agent of the defendants, and they were not liable for a large sum received by C. and not paid into the bank (a).

*Hobson v. Jones.*

Sums received by agents.

A trustee for creditors, like any other trustee, may render himself liable to pay interest on balances improperly retained by him (b).

Interest on balances.

The ordinary rule against allowing a trustee to make a profit of his trust applies to inspectors (c).

To an action for a general account against inspectors, all the inspectors, or their representatives, must be parties (d).

(a) *Hobson v. Jones*, 9 Eq. 456.

(b) *Treves v. Townshend*, 3 Bro. C. C. 384; and see Lewin on Trusts,<sup>6</sup> 298.

(c) *Chaplin v. Young*, No. 2, 33 Beav. 414.

(d) *Coppard v. Allen*, 33 L. J. Chy. 475.

3. Liability to third persons in carrying on debtor's business.

(iii.) *Liability to third persons incurred in carrying on the debtor's business.*

An inspectorship deed will usually contain a provision for indemnifying the inspectors against any liability they may incur in carrying out the trusts; but as, under some circumstances, this provision may prove practically valueless, it will be well to consider the liability that inspectors incur in carrying on the debtor's business.

Where trustees carry on business as principals.

If the business is assigned to the trustees, and they carry it on as principals, they thereby render themselves liable for goods supplied, for the purposes of the business, during the time that they are principals (*a*), unless the persons supplying such goods agree to look elsewhere for payment.

Trustees ostensibly contracting as principals personally liable.

It is more usual, however, for the debtor not to assign the business, but to continue to conduct it under the supervision of the inspectors, who control the trading and supply the necessary funds. Under such circumstances, the question has more than once arisen, whether the inspectors are liable for goods supplied for the purpose of the business. Of course, although the business has not been assigned to the trustees, so as to render them principals, yet if they contract *ostensibly* as principals, and do not exclude their personal liability, they will be personally liable for goods supplied, and services rendered, under such contracts (*b*). Where, however, the inspectors have not so ostensibly acted as principals, their liability depends on the answer to the question, whether the business is

(*a*) See, however, *Easterbrook v. Barker*, L. R. 6 C. P. 1, *post*, p. 181 *seq.*, where the goods, *but not the business*, were assigned to the trustees.

(*b*) *Wardell v. Jackson*, 1 F. & F. 452.

carried on by the debtor, as agent, on behalf of the inspectors, as principals.

The first case on the point seems to have been *Redpath v. Wigg (a)*, in the Exchequer Chamber. This was an action brought against the inspectors of the estate of C. J. Mare, for goods sold under the following circumstances. Mare traded under the name of C. J. Mare and Co., and the order for the goods, which was signed by a clerk of Mare's "for C. J. Mare and Co.," was given to the plaintiff prior to the inspectorship deed. Before the goods were ready for delivery, Mare stopped payment, and executed an inspectorship deed, of which the defendants were inspectors. By the deed the creditors granted the debtor licence to carry on his business for six months, under the control of the inspectors, and he appointed the latter his attorneys to recover his estate and effects. The inspectors were to pay current expenses (including salaries, rent, and plant and materials for the purpose of the business), and, out of the surplus, to pay dividends to the creditors. The inspectors had power to put an end to the deed on violation of its terms by the debtor; they took no share of the profits, and had no power to take the management of the business to the exclusion of the debtor.

*Secus:*  
where  
trustees  
neither  
actually  
principals  
nor osten-  
sibly con-  
tracting  
as such.

*Redpath v.*  
*Wigg.*

After the execution of this deed, the plaintiff wrote to C. J. Mare and Co. that the goods were ready for delivery, and, in reply, received a request to send them, signed by the defendants "for C. J. Mare and Co." The goods were sent with an invoice made out to "The Inspectorship trustees of the estate of C. J. Mare and Co." This invoice was sent back, with a note signed by a clerk "for C. J. Mare and Co.," requesting that it might be altered

(a) L. R. 1 Ex. 335.

and made out to C. J. Mare and Co.; and this alteration was made (but without the plaintiff's authority), and the invoice returned. It was held, under these circumstances, that the defendants, having expressly signed the order "for C. J. Mare and Co.," the plaintiff could not rely upon any ostensible liability of the defendants, but must shew that the capacity, which they actually filled, was that of Mare's real principals, so as to be in substance themselves C. J. Mare and Co., for the time; and that upon the terms of the deed the defendants could not be regarded as Mare's real principals, or liable as such for debts incurred by Mare and Co. Willes, J., who delivered the judgment of the Court, observed in so doing (a): "It would, of course, be possible to suppose a case in which the debtor became by the arrangement a mere servant, acting only for the benefit of others, or in which the business was intended to be carried on at the expense of new creditors, who might be deceived into giving credit to the debtor, but really for the advantage of the old ones. Such a case, should it arise, will admit of an easy solution as one of fraud. On the other hand, there may be a good business with temporary embarrassment, where the intention is to keep together the debtor's business in his name (which may be an important element in its value) and for his permanent benefit, as well as for the temporary benefit of his creditors; where, with that view, a letter of licence is granted, enabling him to carry on the business, and to retain it for himself after he has paid his creditors, but the creditors stipulate that, until the debts are discharged, the business shall be carried on under the inspection and control of persons appointed by them, who shall receive the proceeds, pay the current expenses of the business,

(a) L. R. 1 Ex. 340.

and distribute the surplus ; in such a case, the object seems to be, to maintain the debtor in the same position as he previously occupied, as the person principally interested in the business ; and it seems no more reasonable to hold the inspectors liable, as being his masters, than it would be to say that a confidential clerk, to whose opinion his employer habitually deferred, or to whom he entrusts the entire conduct of the business, is, as to third persons, the principal. . . The mere fact of inspecting and controlling another person's business, does not involve responsibility for debts contracted therein by him or in his name. . . . Nor can the plaintiff justly complain of the result. The form of the order gave him notice that Mare and Co. were his customers, and to that firm, and to the trust for payment of current expenses, he must be content to look."

The decision in *Redpath v. Wigg* (a) was considered, and followed, in *Easterbrook v. Barker* (b). J. P., who carried on business as a manufacturer in steel, being indebted to several creditors, and, amongst others, to the defendants, executed a deed, by which the defendants were appointed creditors' trustees. By this deed, which recited an agreement for a composition of 10s. in the pound, J. P. covenanted to pay the composition, and assigned all his lands, goods, etc., to the defendants, and covenanted that he would carry on or wind up his business under their superintendence and control, and would draw and accept bills, etc., as required by them, and that all moneys accruing in respect of the business should be deposited in a bank, and that he would in all respects act upon the directions of the trustees in relation to the carrying

*Easterbrook v. Barker.*

(a) L. R. 1 Ex. 335 ; *ante*, p. 179.

(b) L. R. 6 C. P. 1.

*Easterbrook v. Barker.*

on or winding up of the business. The trustees were empowered to employ any person for effectuating the purposes of the deed with salary, and might draw and accept bills for the purpose of carrying on the business, and might make advances in respect of the business. The sums received by the trustees were to be applied, after payment of debts incurred in reference to the carrying on or winding up of the business, and of advances made by the trustees, in payment to J. P. of such sums (if any) as the trustees should, from time to time, think fit to allow him, as a remuneration for his trouble in carrying on or winding up the business, and the surplus was to be held in trust for J. P., and was to be invested in the meantime. The deed then declared, that if the instalments of the composition should be duly paid, all the real and personal estate, surplus moneys, etc., should be re-transferred, with a proviso that, if any instalments should be unpaid, the trustees should hold and realise the estate, upon trust, to pay all expenses, etc., including the debts incurred in reference to the carrying on or winding up the business, and then to pay all the creditors, parties to the deed, rateably in full.

The plaintiff sued for goods sold. The orders were given in the debtor's own name six months after the date of the deed, but there was no evidence by whom they were sent, and the plaintiffs failed to show that the defendants had any personal knowledge of the orders, or of the delivery of the goods; and it did not appear that the plaintiff had any knowledge of the deed, or of the arrangements carried into effect under it. After the execution of the deed, J. P. personally managed the business at his works, and paid over all the moneys gained by the business to a banking account, kept for the purpose by the defendants.



The defendants met at the works weekly, and inspected the books, and supplied J. P. with the money that would be required during the ensuing week for disbursements, and a further sum for wages, etc. J. P. had no authority from the defendants to pledge their personal credit. Upon these facts, it was held, that since the whole scope of the deed was, not to transfer the business to the trustees, but that it should remain the business of the debtor, though carried on by him under their inspection and control, the trustees were not liable for the goods supplied to the debtor on credit. The judgment of the Court was delivered by Brett, M.R. (a), who pointed out, that the test of the defendant's liability lay in the intention of the parties to the deed, *i.e.*, whether it was intended that the trustees should become principals, and the debtor their servant, or whether the debtor was master, and the trustees only inspectors and controllers. From an examination of the terms of the deed (*viz.*, the non-assignment of the debtor's business, and the minute stipulations with regard to the carrying it on and relinquishing it—all of which were inconsistent with the idea that the trustees were his masters and he their servant), he came to the conclusion that the trustees were not principals. The various contentions, which were urged in favour of the liability of the defendants, were well dealt with at the close of the judgment (b), "There was no liability in respect of an ostensible authority, for the plaintiff gave credit to Parkin; there was no liability in respect of authority in fact, apart from the deed, for the deed was carried into effect according to its terms; and the deed did not create an authority to pledge the trustees' credit, for it only

(a) Then Brett, J.

(b) L. R. 6 C. P. 13.

subjected the debtor to their control as to how he should carry on the business as before, upon his own resources, save in respect of advances made by them in their discretion; and it did not, as matters stood, make him their servant subject to be discharged by them, so that they could have got rid of him and set up in business for themselves" (a).

*Summary.*

Events in which inspectors may be liable for goods supplied to the business.

From a consideration of the preceding cases, it appears that trustees, acting as inspectors of a debtor's business, may be liable to creditors for goods supplied to that business in three cases:

1. Where they order the goods and credit is given to them, whether the business is theirs and they are principals or not (b).

2. Where the goods are supplied for a business of which they are principals, whether at the time they were known to be so by the creditor or not.

3. Where, though not occupying the position of principals, they have authorised the debtor to pledge their credit, and he has done so.

The liability incurred by trustees in the event of the instrument, under which they have purported to act, being avoided by a subsequent bankruptcy will be considered in the following chapter (c).

Creditors parties to an arrangement by which the business is carried on

This will be a convenient opportunity for considering the liability incurred by creditors who are parties to an arrangement by which the debtor's business is to be carried on for their benefit—namely, whether they are

(a) With the preceding cases *cf.* *Steele v. Low*, 2 F. & F. 772; and *Rose v. Edwards*, 1 M. & W. 734.

(b) *Cf.* *Wardell v. Jackson*, 1 F. & F. 452.

(c) *Post*, pp. 192 *seq.*

partners *inter se*, and liable to third persons for goods supplied for the purposes of the business.

for their  
benefit not  
liable as  
partners.

That they are not partners *inter se*, so as to come within the Companies' Acts, was decided by Lord Romilly in *Re Stanton Iron Company* (a). The question of their liability as partners to third persons was thoroughly sifted in *Cox v. Hickman* (b). A. and B., the debtors, had carried on business in partnership under the style of "The Stanton Iron Company." By a deed—expressed to be between A. and B. of the first part, five trustees of the second part, and the several persons whose names were contained in a schedule as creditors for the sums therein mentioned, and who should execute the deed, of the third part, reciting that A. and B. were indebted to the several persons parties thereto of the third part; and that they had agreed to assign all their estates and effects for the benefit of such creditors—A. and B. assigned the iron works and all their property and effects to the trustees, upon trust, among other things, *to carry on the business under the name of "The Stanton Iron Company," and out of the profits to pay interest on mortgages, &c., and to pay and divide the net income of the business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of A. and B., in rateable proportions, according to the amount of their respective debts.* Provision was made for calling meetings of the creditors, and power was given to a majority in value of the creditors at such meeting, to alter the trusts of the deed, and to give directions as to the management of the business, or to order it

*Cox v.*  
*Hickman.*

(a) 21 Beav. 164.

(b) 9 C. B. (N.S.) 47—in H. L. For the references to the reports of the hearing in the Courts below, see *ante*, Table of Cases.

to be discontinued, in which case it was thereupon to be wound up. It was held in the House of Lords, that creditors executing this deed did not become liable *as partners* for debts contracted by the trustees in carrying on the trade—that the trustees were not agents carrying on the business for the creditors as principals.

#### iv. Provisions for indemnifying trustees.

Trustee's  
indemnity.

Creditors  
acceding  
though not  
executing  
bound by  
covenant  
to indem-  
nify.

*Cheese-  
borough v.  
Wright,  
ex parte  
Waud.*

It is usual to insert a covenant on the part of the creditors, that they will indemnify the trustees against liability in the execution of the trusts (such indemnity being either limited to a fixed amount, or unlimited) each creditor undertaking to contribute in proportion to the amount of his debt. A creditor, who comes in under or accedes to an arrangement, is bound by such covenant, although he may not have executed the deed, and he will be compelled to contribute (a). Under special circumstances, however, a creditor may not be bound to contribute in respect of the whole of his debt. Thus, in *Cheeseborough v. Wright, ex parte Waud* (b), M.'s creditors resolved on winding up his affairs under inspection, and a preliminary agreement to that effect was prepared, and the plaintiff and four other creditors agreed to act as inspectors. Two creditors of the name of Waud had, prior to this, taken proceedings in bankruptcy against M. in respect of a bill of exchange for £1218, there being also a balance of £3300 due to them on a general trade account. On being urged to abandon their bankruptcy proceedings, they consented to concur

(a) *Cheeseborough v. Wright*, No. 2, 28 Beav. 283.

(b) 10 W. R. 47.

in the inspectorship arrangement, on the terms that the amount due in respect of the bill of exchange should be paid in full, in priority to all other payments; and these terms were agreed to by the other creditors. The deed of inspectorship provided for the winding-up of the business, and authorized the inspectors to carry into effect the above arrangement. The deed contained a provision, that the inspectors should be indemnified against all loss out of the assets of M., or otherwise by the creditors, *in proportion to the amount of their debts*. The inspectors borrowed a sum of money sufficient to pay the bill and pay a dividend of 3s. 4d. to the creditors who had come in, and also incurred various other liabilities in carrying on the business. M.'s assets having been exhausted, the plaintiff filed a bill against the creditors and the four other inspectors, to compel the creditors to indemnify the inspectors against the various liabilities, and it was held by the Lords Justices, that the Wauds were only bound to contribute in respect of the £3300, on which they had received a dividend, and not on the £1218 which had been paid to them in full.

A creditor of the trustees for work done for them as trustees cannot enforce their right to be indemnified (a), except perhaps where there is a charge of collusion against the trustees (b). Where there is a several and limited covenant by the creditors with the trustees to indemnify them, each creditor is liable for his own proportion, and there is no privity between the creditors, so as to give rise to a right of contribution between them (c); but, when the total amount which the trustees

Creditor of the trustees cannot enforce their right to an indemnity.

(a) *Worrall v. Harford*, 8 Ves. 4.

(b) *Selwyn v. Harrison*, 2 J. & H. 334.

(c) *Ibid.*

would be entitled to claim has been ascertained in a suit for the administration of the trusts, a creditor of the trustees may obtain leave to proceed, at his own risk, in the name of the trustees, against any creditors whom the trustees might not think fit to sue (a).

(a) *Ib.*; and see *Singleton v. Selwyn*, 12 W. R. 98.

## CHAPTER XV.

### THE EFFECT OF THE BANKRUPTCY ACT ON ASSIGNMENTS FOR THE BENEFIT OF CREDITORS AND COMPOSITION AGREEMENTS.

THE Bankruptcy Act, 1883 (a), provides that a debtor commits an act of bankruptcy, "if in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally."

Assign-  
ment by  
debtor of  
his pro-  
perty for  
benefit of  
creditors is  
an act of  
bank-  
ruptcy.

Prior to any distinct enactment on the point (which first appeared in the Bankruptcy Act, 1869), it had long been held, that an assignment of the whole of his effects for the benefit of creditors, by a trader, was an act of bankruptcy, on the ground (among others) that the debtor "thereby endeavours to put his property under a different course of application and distribution among his creditors, from that which would take place under the Bankruptcy Law" (b).

Such an assignment is none the less an act of bankruptcy because it contains a proviso that it shall be void "if proceedings in bankruptcy shall be taken," or "if all

Provisoes  
for avoid-  
ance do not  
prevent  
deed being

(a) 46 & 47 Vict. c. 52, sec. 4 (1) (a).

(b) *Per* Lord Eldon in *Dutton v. Morrison*, 17 Ves. 199.

act of  
bank-  
ruptcy.

the creditors do not sign" (a), or, "if the trustees shall think fit to avoid it" (b); nor because it was intended to be used as an act of bankruptcy (c). It is immaterial also, that the deed does not purport to be an assignment of the whole, if it is so in fact (d). A colourable (e), or trifling (f), exception from the assignment will not prevent it being an act of bankruptcy.

Assign-  
ment not  
executed  
by other  
parties and  
not acted  
on may be  
an act of  
bank-  
ruptcy.

A deed of assignment purporting to be made by several partners, and to transfer all their effects for the benefit of creditors, but executed by one of them only, in the absence of anything to show that the deed was delivered as an escrow, is an act of bankruptcy by the one who executes it (g). It is immaterial that the deed has not been executed by any one but the debtor (h), and has never passed out of the debtor's possession (i). Where an assignment for the benefit of creditors was executed by the debtors and the trustees, but not by any creditors, and the trustees subsequently put a bailiff in possession, but before anything else was done the deed was destroyed, it was held an act of bankruptcy (j).

Escrow not  
an act of  
bank-  
ruptcy.

Where, however, the instrument is delivered as an escrow, it is not an act of bankruptcy until it becomes

(a) *Dutton v. Morrison*, 17 Ves. 193; and cf. *Back v. Gooch*, 4 Camp. 232.

(b) *Tappenden v. Burgess*, 4 East, 230.

(c) *Simpson v. Sikes*, 6 M. & S. 295; and cf. *Turner v. Hardcastle*, 11 C. B. (N.S.) 683.

(d) *Lindon v. Sharp*, 6 M. & Gr. 895.

(e) *Wilson v. Day*, 2 Burr. 827.

(f) *Ex parte Dann, re Parker*, 17 Chy. Div. 26.

(g) *Bowker v. Burdekin*, 11 M. & W. 129.

(h) *Botcherby v. Lancaster*, 1 A. & E. 77.

(i) *Pulling v. Tucker*, 4 B. & Ald. 382; *Botcherby v. Lancaster, u. s.*

(j) *Lees v. Whitely*, L. R. 2 Eq. 143.



complete by the happening of the event, on which it was to take effect (a).

An assignment of a debtor's property for the benefit of creditors may be given in evidence as an act of bankruptcy, although unstamped (b).

But, although such an assignment is an act of bankruptcy, it is not open to every creditor to found proceedings in bankruptcy upon it. A creditor will be estopped from setting it up as an act of bankruptcy if he has executed it (c), or been privy to and acquiesced in its execution (d), or has taken some benefit under it, or done some act confirming it (e), and it is unnecessary for this purpose that he should have so far assented to it as to be bound by its provisions (f). But, although a creditor has given his assent to the proposal of the debtor to assign his effects for the benefit of his creditors, yet, if the deed contain a stipulation in favour of a particular creditor which was not explained to the creditor sought to be bound, such assent is not binding on him and he may treat the deed as an act of bankruptcy; accordingly a creditor, who had assented generally to an assignment, was allowed to treat as an act of bankruptcy a deed which contained a clause, not before stated to him, pro-

Creditors  
executing  
or acquies-  
cing in it  
cannot set  
up assign-  
ment as  
act of  
bank-  
ruptcy.

*Ex parte  
Marshall,  
re Mar-  
shall.*

(a) *Bowker v. Burdekin*, 11 M. & W. 129.

(b) *Ponsford v. Walton*, L. R. 3 C. P. 167 ; *Ex parte Squire*, 4 Chy. 47.

(c) *Bamford v. Baron*, 2 T. R. 594 ; *Tappenden v. Burgess*, 4 East, 230.

(d) *Ex parte Payne*, De G. 534 ; *Oliver v. King*, 25 L. J. Chy. 427 ; *Marshall v. Barkworth*, 4 B. & Ad. 508 ; *Ex parte Cawkwell*, 1 Rose, 313 ; and *cf. Hicks v. Burfitt*, 4 Camp. 235, and *Ex parte Bayly*, Mont. & M'A. 438, with *Re Marshall*, De G. 273.

(e) *Back v. Gooch*, 4 Camp. 232 ; *Ex parte Alsop*, 1 De G. F. & J. 289 ; *Ex parte Shaw*, 1 Madd. 598.

(f) *Ex parte Stray, re Stray*, 2 Chy. 374.

viding for payment in full of the costs of the debtor's solicitor in defending an action (a).

Relation  
back of the  
bank-  
ruptcy to  
the earliest  
act of  
bank-  
ruptcy  
within  
three  
months  
preceding  
the peti-  
tion.

By the Bankruptcy Act, 1883, sec. 43, it is provided that "the bankruptcy of a debtor shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed, on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition."

Consequent  
risk of  
trustees.

Any assignment, therefore, for the benefit of creditors, which is an act of bankruptcy, may be avoided by a receiving order, made on a petition lodged within three months of the date of the assignment; accordingly, the trustees under such assignment incur great personal responsibility, if they take any steps for the realisation of the property assigned to them until after the expiration of three months from the execution of the instrument; for any expenses they may incur, or payments they may make, thereunder will have been incurred, or made, with notice of an available act of bankruptcy (b), and, on the subsequent avoidance of the deed, they may be obliged to transfer the whole of the property assigned to them, without any credit for such expenses or pay-

Available  
act of  
bank-  
ruptcy.

(a) *Ex parte Marshall, re Marshall*, 1 M. D. & De G. 575.

(b) An available act of bankruptcy is defined by the Bankruptcy Act, 1883, sec. 168 (1), to mean: "any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made," *i.e.*, one committed within three months of such petition.



ments (a). It is true that there have been cases in which the trustees of a creditors' deed have been allowed, on its subsequent avoidance, costs which they have incurred in the execution of the invalid trusts (b), but these were decided under the Act of 1849 (c), which enabled the Court to make just allowances under these circumstances.

In some cases, costs have been allowed to the trustees of an avoided deed, under special circumstances (d), and it certainly seems inequitable, that where the estate has benefited by the action of the trustees, the creditors should be entitled to take the benefit, without bearing the expense by which such benefit has been obtained; and therefore it would be likely that the Court might, where such benefit is shown to have resulted, allow the payments, by which it has been obtained, as being in the nature of salvage-money; but such benefits will have to be distinctly proved, and every case must rest on its individual merits.

Allowances  
to trustees  
in special  
circum-  
stances.

An instance, in which such payments have been allowed, is to be found in *Woods v. Axton* (e). The bankrupt by a deed (which was an act of bankruptcy) assigned some unfinished houses to trustees, who were dealers in building materials, and the deed authorised the trustees to provide the materials necessary to complete the houses.

*Woods v.  
Axton.*

(a) *Smith v. Dresser*, 1 Eq. 651; and see *Re Comber*, 12 W. R. 767, and cf. *Ex parte Harding, re Plumstead Water Works*, 11 W. R. 99, and *Ex parte Dean*, 2 M. D. & D. 438. And where the deed is set aside the Court cannot give the trustees the costs of the proceedings; the most it can do is to set aside the deed without costs. *Elsev v. Cox*, 26 Beav. 95.

(b) *Ex parte Tomlinson, re Boyce*, 3 D. F. & J. 745; *Ex parte Shaw, De Gex*, 242.

(c) 12 & 13 Vict. c. 106, sec. 185.

(d) *Ex parte Cooke*, 10 L. T. (N.S.) 821.

(e) W. N. 1866, p. 207.

The deed having been set aside as invalid, Kindersley, V.C., held that the trustees, having acted *bonâ fide* under it, must be allowed the amounts they had paid, and the value of the materials they had properly supplied in accordance with the terms of the deed.

*Re  
Richards,  
Ex parte  
O. R.*

Remunera-  
tion of  
trustee of  
void deed.

In the very recent case of *Re Richards, ex parte The Official Receiver* (a), the trustee of an assignment, which was an act of bankruptcy, had received various sums but had made payments out of pocket in carrying on the debtor's business which reduced the balance in his hands to about 10%. A receiving order having been made against the debtor, the trustee of the deed claimed to retain this balance, in part discharge of his claim for remuneration. This, it was held, he could not do (b). It will be observed, that here the Official Receiver allowed the sums expended by the trustee, and, possibly, forebore to enforce his strict rights; but, naturally, could not allow the creditors to be charged with the expenses of the execution of the trusts of a deed, which was, on the grounds of public policy, regarded as fraudulent and void as against them. A trustee, therefore, who anticipates any danger of the deed being set aside, must either hold his hand until that possibility is past, or must obtain a guarantee for payment of his remuneration from some friend of the debtor who is anxious for the arrangement to be carried into effect.

O. R. must  
elect  
whether to  
treat  
trustee as  
agent or as  
trespasser.

The official receiver, however, or the bankruptcy trustee (as the case may be) must elect whether he will treat the trustee under the deed as his agent or as a trespasser, and if he elect to treat him as a trespasser, he can only claim any property of the debtor which remains in the trustee's possession unconverted, and the value (at the

(a) 32 W. R. 1001.

(b) See also *post*, p. 196.

time when the trustee took possession) of any property which he has taken possession of and converted (a).

Where the trustees of an assignment for the benefit of creditors are not allowed, in accounting to the trustee in bankruptcy, to set off payments made by them in the execution of the invalid trusts, it is difficult to see upon principle, how they can have any remedy for the recovery of sums so paid. The Bankruptcy Act, 1883, sect. 37 (2), provides that "a person having notice of any act of bankruptcy available against the debtor shall not prove for any debt or liability contracted by the debtor subsequently to the date of his so having notice," and this would seem to exclude proof for such payments; but it is suggested, that where the payments go in discharge of claims, which would have ranked against the debtor's estate, and the amount of the claims against the debtor's estate is not increased by the admission of proofs for these payments, then the transaction really amounts to an assignment to the trustees of the debt so paid by them, and that, therefore, the trustees ought to be admitted to prove for sums so expended. Perhaps the remarks of Cotton, L.J., in *Ex parte Chaplin* (b) are attributable to some such line of thought. After deciding that Messrs. Chaplin, in accounting to the trustee for the proceeds of the property on the deeds being set aside, were not entitled to have their advances (made by them for the purpose of carrying on the business) allowed them by way of set-off, he adds: "But if any sums were *bonâ fide* advanced by Messrs.

Where trustees of avoided deed are not allowed to retain sums out of proceeds of property—*quære* whether they can prove for them.

B. A. 1883, sec. 37 (2).

(a) *Re Riddeough, ex parte Vaughan*, 14 Q. B. D. 25, overruling the startling decision in the County Court, 28 Sol. J. 655. This (which seems a very reasonable decision) was decided by the Divisional Court, and there has been no decision on the point in the Court of Appeal as yet.

(b) 26 Chy. Div. 319, at p. 333; see *ante*, pp. 114 *seq.*

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(1902) 21 W.R. 1002.

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(b) 26 Chy. Div. 819, at p. 333; see *ante*, pp. 114 *seq.*

Chaplin, either before the execution of the deeds or after, they will be entitled to prove in respect of them. I do not say they are entitled to prove, but in respect of any sums properly paid they will be entitled to prove." Now, as the deeds in question were set aside by the majority of the Court, on the ground that they were an act of bankruptcy, and the sums paid after their execution were paid with notice of such act of bankruptcy, it is difficult to see how any such sums could be said to be properly paid, unless by that term were meant sums that went in reduction of the debtor's existing debts, the idea being that Messrs. Chaplin should be allowed to stand in the shoes of the creditors whose claims they discharged.

Proof for  
trustee's  
remunera-  
tion.

It was suggested in *Re Richards (a)*, that the trustee ought to prove for his remuneration for services rendered with notice of the act of bankruptcy, but whether such proof could be admitted seems at least doubtful.

Trustee of  
void deed  
not liable  
for acts of  
debtor as  
of his  
agent.

*Ex parte  
Chaplin.*

The case of *Ex parte Chaplin (b)* deserves attention on account of an attempt that was there made to extend the liability of persons taking under an invalid assignment to payments made by the debtor as their agent. The facts of the case have been already set out at some length, but may be here briefly recapitulated. The debtor assigned all his property, including his business, to a creditor, C., and, by a separate agreement, agreed to carry on the business as agent for C., at a weekly salary. The debtor carried on the business under the direction of C., but ostensibly as if he were still owner, and the banking account of the business was continued in the debtor's name. On

(a) 32 W. R. 1001; *ante*, p. 194.

(b) 26 Chy. Div. 319; *ante*, pp. 114 *seq.*, and 195.



the deeds being subsequently set aside as an act of bankruptcy, it was sought to treat C. as having carried on the business by the debtor as his agent, and to make C. liable for all the dealings of the debtor with the property, and accountable for all his receipts and payments in the business; but the Court held, that, though the assignment and the agreement for carrying on the business were by separate instruments, yet they should be looked upon as one transaction, and if the property which passed by the principal deeds was to be treated as the property of the debtor, it would be wrong to treat C. at the same time as having employed the debtor as his servant in carrying on the business.

But although an assignment for the benefit of creditors is liable to be set aside as an act of bankruptcy at any time within three months of its execution, yet when that period has elapsed (unless it comes within the mischief of the Statute of Elizabeth (a)) it becomes indefeasible (b), and the trustees may with safety proceed to the execution of the trusts for the realisation and distribution of the fund.

After lapse of three months assignment not available as act of bankruptcy.

It should be borne in mind, that there is another ground on which a creditors' agreement (even though it contained no assignment of the debtor's property) might be void as an act of bankruptcy. By the Bankruptcy Act, 1883 (c), a new act of bankruptcy is introduced, viz., "If the debtor gives notice to any of his creditors that he

Act of bankruptcy by notice of suspension of payment.  
B. A. 1882, sec. 4, subs. 1 (h)

(a) *Ante*, Chap. IX., pp. 108 *seq.*

(b) *Per* Giffard, L.J., *Allen v. Bonnett*, 5 Chy. 582; *Ex parte Games*, 12 Chy. Div. 324.

(c) Sec. 4, sub-s. I. (h).

has suspended, or that he is about to suspend, payment of his debts."

*Ex parte Oastler.*

In *Ex parte Oastler* (a) one of the debtors stated to a creditor, in his partner's presence, that he was unable to pay the debts of the firm, and offered a dividend of 20 per cent.; he further stated that he could obtain assistance from his brother-in-law, who, however, would not assist him until he had made some arrangement with his creditors. The Court of Appeal (Baggallay, Cotton, and Lindley, L.JJ.) held that there had been no notice within the section, and that a statement by a debtor to a creditor that he is unable to pay his debts in full, is not a notice that he has suspended, or is about to suspend, payment of his debts; that although such a notice may be given orally (b), it must be given formally and deliberately, and *with the intention of giving notice*.

Notice must be formal and deliberate.

It would seem, therefore, that even a recital in a deed of the debtor's inability to pay his debts might not amount to an act of bankruptcy, but if the provisions of the deed would not amount to an act of bankruptcy without such recital, it would be very unwise to insert it.

(a) 13 Q. B. Div. 471.

(b) On this point confirming *Ex parte Nickoll, re Walker*, 13 Q. B. D. 469.

## CHAPTER XVI.

### PRACTICAL SUGGESTIONS WITH REFERENCE TO PRIVATE ARRANGEMENTS WITH CREDITORS.

A FEW practical observations, suggested by the difficulties and dangers which have occurred, or may occur, in the working of these agreements, may not be out of place.

A composition agreement should show clearly on its face whether it is intended to be conditional on the concurrence of a certain proportion (in number or value) of the creditors, or is to be binding on those who accede to it in any event (*a*). Agreement should show whether it is conditional or absolute.

Where it is desired to effectually restrain creditors from suing for a limited period, so as to give the debtor an opportunity of retrieving his position, it would be advisable either to adopt the terms of the agreement in *Ellis v. McHenry* (*b*), or that the creditors should be expressed to release their debts subject to a proviso avoiding the release in a given event or events—e.g., a certificate by the inspectors that the scheme cannot be carried out, or the debtor's default (*c*). Restraining creditors from suing for limited time.

(*a*) *Norman v. Thompson*, 4 Ex. 755; *Lewis v. Jones*, 4 B. & C. 506; and see *ante*, p. 9.

(*b*) 6 C. P. 228.

(*c*) See *ante*, pp. 36 *seq.*

Proviso  
that debtor  
shall not  
set up  
Statute of  
Limita-  
tions.

In any case in which the creditors are restrained from suing for a limited time, or in which they do not take the agreement itself, or the assignment made thereunder, in satisfaction of their debts, but there remains something further to be done on the debtor's part, default in which, it is contemplated, shall remit the creditors to their original rights, a covenant by the debtor should be introduced, that in the event of his making default in payment of the composition, or in otherwise fulfilling his part of the agreement in the manner appointed, he will pay the debts in full, or, perhaps, a covenant that, in the like event, he will not set up the Statute of Limitations in answer to an action by any of the creditors within six years after the date of the deed, or (if the creditors are to be restrained from suing for an ascertained period) within six years after the expiration of such period (a).

Proviso  
giving  
trustees

If a time is fixed by the deed within which the creditors are to accede, there should be a provision giving the trus-

(a) See *Fuller v. Redman* (No. 2), 26 Beav. 614, *ante*, p. 65. In *The East India Co. v. Paul* (7 Moo. P. C. C. 85) Lord Campbell said (at p. 112): "There might be an agreement that in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitations in respect of the time employed in the inquiry, and an action might be brought for breach of such an agreement; but if to an action for the original cause of action the Statute of Limitations is pleaded, *upon which issue is joined*—proof being given that the action did clearly accrue more than six years before the commencement of the suit—the defendant, notwithstanding any agreement to inquire, is entitled to the verdict." See also *Banning on Limitations*, p. 51. It would seem, however, that now, if to an action for debt the defendant set up the Statute of Limitations, and the plaintiff in reply relied on an agreement for good consideration not to plead the Statute, it would be competent for the Court (under Jud. Act, 1873, sec. 24 (7)) to give effect to such agreement in the action, so as finally to determine the matters in controversy between the parties. See also *Lade v. Trill*, 6 Jur. 272.

tees a discretion to admit creditors after the expiration of the period limited. Such a provision will remove all doubts as to the power of the trustees to admit creditors, and may save the expense of an application to the Court, as well as relieve the debtor from being harassed by actions by creditors who have been excluded from the benefit of the assignment (a).

discretion  
to admit  
creditors  
after ex-  
piration of  
time  
limited for  
accession.

Onerous leaseholds held by the debtor, and any other property to which a burden attaches, should not be assigned to the trustees, but the debtor should covenant to assign such property in such manner as the trustees shall direct (b).

Leaseholds.

In case the debtor is a trader, and it is desired to carry on the business under inspection, care should be taken not to render the trustees liable as principals; or if the business is assigned to the trustees, the trustees should be careful to exclude their personal liability, in contracting for goods to be supplied on credit for the purposes of the business (c).

Debtor's  
business.

Where the deed is an act of bankruptcy, trustees cannot safely convert the property until the expiration of three months from its execution (d); if it is necessary to carry on the business in the interval this should be done by the debtor (e): but the assignment must not be kept a secret during the three months, otherwise it will be liable to be set aside as fraudulent under the statute 13 Eliz. c. 5 (f).

(a) See *Garrard v. Woolner*, 8 Bing. 258, *ante*, p. 61; *Johnson v. Kershaw*, 1 De G. & Sm. 260, *ante*, p. 168.

(b) *White v. Hunt*, L. R. 6 Ex. 32; and see *ante*, p. 174.

(c) *Redpath v. Wigg*, L. R. 1 Ex. 335, and other cases, *ante*, p. 179 *seq.*

(d) *Ante*, p. 192.

(e) *Ex parte Chaplin, re Sinclair*, 26 Chy. Div. 319, *ante*, p. 196.

(f) See *ante*, p. 108, and per Fry, L.J., 26 Chy. Div. 337.

Since it was held, in *Ex parte Oastler* (a) that a *verbal* notice of suspension of payment may amount to an act of bankruptcy under the Bankruptcy Act, 1883, sec. 4, sub-sec. 1 (b), care will have to be taken in the negotiations for an arrangement, to avoid giving such notice. Where a meeting is called by letter, a form of circular suggested in a recent number of a periodical (b) seems to meet the difficulties of the case.

(a) 13 Q. B. Div. 471.

(b) 29 Sol. J. p. 1.

## APPENDIX.

No. I.

No. I.

ASSIGNMENT FOR BENEFIT OF CREDITORS by SINGLE  
DEBTOR to SINGLE TRUSTEE—*Conveyance of Freeholds, Lease-  
holds, Shares, and Personalty*—COVENANT to surrender COPYHOLDS  
—RELEASE by Creditors—PROVISORS preserving benefit of SECURI-  
TIES, &c. (a).

1. Parties.
2. Recital of title to freeholds.
3.   "       "       copyholds.
4.   "       "       leaseholds.
5.   "       "       personalty.
6.   "       debts.
7.   "       agreement to execute deed.
8. 1st testatum—  
    Conveyance of freeholds, leaseholds, and copyholds.

(a) An objection is sometimes felt to the adoption of a form like that in the text, on the ground that it is *on its face* an act of bankruptcy, and that any one purchasing from the trustee would purchase with notice of an act of bankruptcy. To avoid this, the device is sometimes adopted of conveying the property to the trustee on trust to sell and hold the proceeds in trust for the debtor, the trusts for distribution among the creditors being declared by a separate deed. Even, however, where this plan is adopted, it would be very unwise for the trustee to attempt to dispose of the property until after the expiration of three months from the execution of the deed, because, although a purchaser purchasing without notice of an act of bankruptcy would be protected, yet the trustee would be liable, if a receiving order were made on a petition presented within three months of the execution of the deed, to account to the Official Receiver either for the proceeds of sale or for the value of the property sold (Bankruptcy Act, 1883, secs. 43 and 44. See *ante*, pp. 192, 194). On the other hand, after the expiration of three months from the execution of the deed, if no petition against the debtor had been presented in the meantime, a purchaser *with notice* that the assignment to the trustee was an *act of bankruptcy* would be protected (since the assignment would no longer be an "available act of bankruptcy" (*ib.* secs. 49, 168 (1) ), and he could not rely on the act of bankruptcy as an objection to completing.

No. I.	9. Habendum of freeholds. " leaseholds. " personalty. 10. 2nd testatum— Covenant to surrender copyholds. 11. Covenant to convey excepted property. 12. Declaration of trusts.—Collection and sale. 13. Trusts of proceeds of sale. 1st. For payment of costs. 2nd. " preferential debts. 3rd. Rateable distribution among creditors. 16. Trustee's remuneration. 17. Power to delay sale. 18. " insure, &c. 19. " carry on business. 20. " allow debtor to retain certain property. 21. Debts to be debts provable in bankruptcy. 22. 3rd testatum— Release by creditors. 23. Proviso that release shall not prejudice securities, &c. 24. Provisoes for valuation or abandonment of securities. 25. Revaluation of securities. 26. Verification of debts. 27. Arbitration clause. 28. Power to any two members of committee to act. 29. Power to appoint new trustees or members of committee.
Parties.	1. THIS INDENTURE made the — day of — 18—, BETWEEN A. B., of, etc. ( <i>debtor</i> ), of the first part, C. D. of, etc. ( <i>trustee</i> ) of the second part [E. F. of, etc., and G. H. of, etc. (hereinafter called "the committee of inspection"), of the third part], and the several persons, companies, and firms, whose names and seals are hereunder signed and affixed respectively, being creditors of the said A. B., and all other creditors of the said A. B. acceding to these presents (hereinafter called "the creditors") of the third [fourth] part
Recital of title to freeholds.	2. WHEREAS the said A. B. is now seised in fee simple in possession [free from incumbrances] of the hereditaments and premises described in the First Schedule hereto [subject to the several charges and incumbrances mentioned in such Schedule as affecting the same hereditaments respectively]
Copyholds.	3. And is possessed of or entitled to the hereditaments described in the Second Schedule hereto, in customary fee simple [free from incumbrances] according to the customs of the several manors of which the same respectively are holden [subject, <i>as above</i> , par. 2]
Leaseholds.	4. And is also possessed of or entitled to the hereditaments and premises described in the Third Schedule hereto, for the respective residues of the terms granted by the several leases specified in such Schedule, subject to the rents, covenants, and conditions reserved by and contained in such respective leases [and subject, <i>as above</i> , par. 2]
Personalty.	5. And is also possessed of the shares in public companies and other



personal property, the particulars whereof are contained in the Fourth Schedule hereto	No. I.
6. AND WHEREAS the said A. B. is indebted to the said creditors in the several sums set opposite to their respective names in the Sixth Schedule hereto	Recital of debts,
7. AND WHEREAS the said A. B. has agreed to make the assurance, and enter into the covenants hereinafter contained, and the said creditors have agreed with the said A. B., and mutually, each with the others, to accept these presents in satisfaction of their debts, and to execute the release hereinafter contained	and of agreement to execute deed.
8. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreements, and in consideration of the premises, the said A. B., as BENEFICIAL OWNER, hereby conveys (a) unto the said C. D. :—	1st testament. Conveyance of freeholds,
<i>Firstly.</i> All those hereditaments and premises described in the First Schedule hereto	
<i>Secondly.</i> All those hereditaments and premises described in the Third Schedule hereto	of leaseholds,
<i>Thirdly.</i> All those shares (b) and other personal property, the particulars whereof are contained in the Fourth Schedule hereto, and all other the property of the said A. B. to which he is beneficially entitled whether in possession, reversion, remainder, or expectancy, except such parts thereof as are specified in the Second and Fifth Schedules hereto respectively	of other personalty.
9. To HOLD the same, as to the said hereditaments firstly hereby conveyed Unto and to the use of the said C. D. in fee simple [subject to the several charges and incumbrances mentioned in the First Schedule hereto as affecting the same or some part or parts thereof] And as to the hereditaments secondly hereby conveyed Unto the said C. D. for the respective residues of the terms granted by the several leases specified in the Third Schedule hereto, subject to the rents, covenants, and conditions contained in and reserved by such respective leases [and subject to the several charges and incumbrances mentioned in such Schedule as affecting the said hereditaments or some part or parts thereof] And as to the said premises thirdly hereby conveyed Unto the said C. D. absolutely, Nevertheless, as to all the said premises	Habendum, of freeholds, of leaseholds, of other personalty.
(a) See Conv. Act, 1881, sec. 49.	
(b) This, though operating to give the trustee an equitable title to the shares, would not entitle him to be registered as the holder. To enable him to be so registered, a transfer of the shares to him in the ordinary form would have to be executed. The conveyance, being made by the debtor "as beneficial owner," imports a covenant to execute further assurances to the trustee or persons deriving title under him (C. A. 1881, sec. 7 (A.)). As registration involves liability to become a contributory, the trustee would usually not take a transfer to himself, but sell the shares and require the debtor to execute a transfer to the purchaser.	

- No. I. Upon the trusts, and subject to the provisos and agreements hereinafter expressed concerning the same
- 2nd testam-  
tum.  
Covenant  
to sur-  
render  
copyholds. 10. AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreements, and for the consideration aforesaid, the said A. B, as BENEFICIAL OWNER, hereby covenants with the said C. D., or other the trustee of these presents (hereinafter called "the trustee"), that he and all other necessary parties (if any) will forthwith, at the cost of the trust estate, surrender into the hands of the lords or ladies of the respective manors, whereof the hereditaments hereby covenanted to be surrendered are holden, according to the respective customs of the said manors, All the hereditaments described in the Second Schedule hereto To the use of the said trustee (or as he shall direct) in customary fee simple, according to the respective customs of the said manors, and under the suits, services, rents, fines, and heriots therefor due and of right accustomed [but subject to the charges and incumbrances mentioned in the said Second Schedule as affecting the same hereditaments or some part or parts thereof] Upon the trusts, and subject to the provisos and agreements hereinafter expressed concerning the same
- Covenant  
by debtor  
to convey  
excepted  
property  
as and  
when  
directed. 11. AND the said A. B. hereby further covenants with the said trustee that he will forthwith, at the request of the said trustee, at the cost of the trust estate, convey, transfer, and assign the leasehold premises and other property, the particulars whereof are specified in the Fifth Schedule hereto, at such times and in such manner as the said trustee shall in writing direct And that he will not in the meantime without the consent of the trustee sell, dispose of, charge, or incumber the same, or any part thereof
- Declaration  
of trust. 12. AND it is hereby AGREED AND DECLARED that the said trustee shall stand possessed of the hereditaments and premises hereby conveyed and covenanted to be surrendered respectively UPON TRUST in such manner as he [or, the Committee of Inspection (a)] shall think fit, to call in, collect, compel payment of, and receive such parts thereof as are outstanding, and to sell and convert into money such parts thereof as do not consist of money (b) And shall stand possessed of the net
- Trusts for  
collection  
and sale.
- (a) This variation can be introduced if necessary, but is liable to impede the action of the trustee unnecessarily.
- Powers of  
trustees  
for sale. (b) By the Conv. Act, 1881, sec. 35, it is provided with regard to instruments executed after the commencement of the Act (unless a contrary intention is expressed in the instrument) as follows, namely, (1), where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract

proceeds of sale (subject to the payment thereof of such sums (if any) as may be due to incumbrancers concurring in such sales respectively), and of all other moneys which shall come to his hands under or by virtue of these presents

No. I.

13. UPON TRUST, in the first place, to pay and retain thereof all costs, charges, and expenses of or incidental to the negotiation, preparation, and execution of these presents, and of or to the carrying of the same into effect

Trust of proceeds.

Payment of costs,

and of preferential claims.

Rateable distribution among creditors.

14. And in the next place to pay all claims which are by law entitled to be paid in full in priority to other debts in case of bankruptcy

15. And to pay, divide, and distribute the residue of the said moneys rateably unto and among the said creditors in discharge of their said debts by such instalments and at such times as the trustee [or, Committee of Inspection] shall think fit, and to pay the surplus, if any, to the said A. B.

16. AND it is hereby DECLARED that the said trustee shall be entitled to retain, by way of remuneration for his services in carrying these presents into effect, the sum of £ [or, a commission of £1 per cent. on the net sum realised by the collection and sale of the said premises respectively (exclusive of any part of the proceeds of any sale paid to incumbrancers concurring in such sale [and exclusive also of assets received and spent in carrying on the business of the said A. B.]), and also a commission of £ per cent. on the amount rateably distributed among the creditors under the trusts hereinbefore declared] [or, where there is a committee of inspection, such sums as the Committee of Inspection shall from time to time consider reasonable]

Trustee's remuneration.

17. PROVIDED ALWAYS and it is hereby AGREED AND DECLARED that, notwithstanding the said trust for conversion and sale hereinbefore contained, it shall be lawful for the trustee [with the consent of the Committee of Inspection] to postpone the sale, conversion, and collection of the whole, or any part or parts, of the said premises respectively, for such time as he at his discretion [or, the Committee of Inspection at their discretion] shall think fit

Powers:—  
to delay sale and collection, &c.,

18. AND in the meantime, and until the said premises respectively shall have been called in, collected, sold, and converted into money as aforesaid, it shall be lawful for the trustee at his discretion to manage, employ, repair, and insure against damage or loss by fire or otherwise, at the cost of the trust estate, all or any part of the said premises.

to insure and manage premises,

19. AND it shall be lawful for the trustee [with the consent of the

to carry on business.

for sale, and to resell without being answerable for any loss. (2). This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

- No. 1. Committee of Inspection] to carry on the business which the said A. B. has hitherto carried on, and for such last-mentioned purpose to make such advances out of the premises for the time being subject to the trusts of these presents as he shall think fit
- Trustee may allow debtor to retain certain property. 20. PROVIDED ALSO and it is hereby AGREED AND DECLARED that with respect to the said premises specified in the Fifth Schedule hereto, it shall not be incumbent on the trustee to enforce the covenants of the said A. B. hereinbefore contained, except so far as he from time to time at his discretion shall think fit [or, unless and until the Committee of Inspection shall otherwise expressly direct] (a).
- All debts provable in bankruptcy to be provable under the deed. 21. AND it is hereby AGREED AND DECLARED that the said creditors shall be entitled to receive dividends under these presents in respect of all debts due to them respectively which would have been provable in bankruptcy, and on the amounts for which they would have been so provable
- 3rd testament. Release by creditors. 22. AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreements, and in consideration of the premises, the said creditors respectively hereby release the said A. B. from the said debts, and from all other debts (if any) owing from the said A. B. to them respectively, in respect whereof they would be entitled to receive dividends under these presents, and from all actions, claims, and demands whatsoever (other than their respective rights under these presents) in respect thereof
- Proviso that release shall not prejudice securities or remedies against third persons. 23. PROVIDED ALWAYS, and it is hereby AGREED AND DECLARED, that nothing herein contained shall prevent the said creditors, or any of them, from enforcing or otherwise obtaining the full benefit of any charge or lien which they respectively now have upon any estate or effects whatsoever, or from suing any person or persons (other than the said A. B.) who may be liable to pay to any of the said creditors all or any part of their respective debts

(a) No power to compound or compromise debts is needed as by the Conv. Act, 1881, sec. 37 (2), it is provided that ". . . two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to . . . the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith," sub-sec. (3) providing that "As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained."

24. PROVIDED ALWAYS that any creditor who may have any charge or lien on any estate or effects of the said A. B., shall be entitled to receive dividends hereunder on and in respect of the balance only of his debt, after realising and allowing for or valuing and deducting the value of such last-mentioned charge or lien, and PROVIDED ALSO that any creditor neglecting to realise or value such last-mentioned charge or lien prior to receiving dividends hereunder, shall be taken to have abandoned such charge or lien

No. I.  
Provisoos  
for valua-  
tion or  
abandon-  
ment of  
securities.

25. PROVIDED ALWAYS and it is hereby AGREED AND DECLARED that it shall be lawful for any creditor who has so valued his security as aforesaid at any time to amend such valuation if the original valuation was made *bonâ fide* on a mistaken estimate, or if the security has diminished or increased in value since its previous valuation, but so that on any increase in the valuation such creditor shall refund the dividends (if any) received by him on the difference between his original and subsequent valuation, and so that no decrease in the valuation shall disturb dividends already declared and payable to any other creditors

Revalu-  
ation of  
securities.

[26. AND it is hereby AGREED AND DECLARED that all creditors before becoming entitled to receive any dividend shall (if required so to do by the trustee) deliver to him a written statement signed by such creditors respectively of their debts or claims, and shall upon the like request verify such debts or claims by a statutory declaration, with respect as well to the consideration as to the amount of the same, but neither any such declaration, nor the execution of these presents, by any of the creditors, shall be conclusive evidence of the validity or amount of such debt or claim]

Verifica-  
tion of  
debts.

27. AND it is hereby AGREED AND DECLARED that in case any dispute, doubt, or question, shall arise between the trustee and any of the said creditors, as to the amount or validity of any debt or claim, or as to any other matter under or incidental to these presents, then every such dispute, doubt, or question, shall be referred to the arbitration of two indifferent persons, one to be appointed by each party, or an umpire to be appointed by the arbitrators in writing before commencing the business of the reference, and the decision or award of the said arbitrators or umpire shall be final and binding on both the said parties, and every such reference shall be deemed an arbitration within the Common Law Procedure Act, 1854, and be subject to the provisions as to arbitration contained in the said Act

Arbitra-  
tion clause.

[28. AND it is hereby AGREED AND DECLARED that any discretion, act, or thing, hereinbefore authorized to be exercised or done by the said Committee of Inspection, may be exercised or done by any two members thereof]

Power to  
any two  
members  
of Com-  
mittee of  
Inspection  
to act.

29. AND it is hereby AGREED AND DECLARED that if any trustee of

No. I. these presents [or any member of the said Committee of Inspection] shall die or go to reside abroad, or refuse, or become incapable or unfit to act, then in every such case it shall be lawful for a majority in number of the said creditors representing in value more than a moiety of the debts ranking for dividend hereunder by writing under their respective hands [and seals] (a) to appoint a new trustee [or member of the Committee of Inspection respectively,] to act in the place of the said trustee [or member of the Committee of Inspection] so dying, going to reside abroad, or becoming incapable or unfit to act, and every trustee [or member of the Committee of Inspection] so appointed, shall have the same powers, authorities, rights, and discretions, as if he had been originally appointed a trustee [or member of the Committee of Inspection respectively] under these presents

Power to  
appoint  
new trustee  
or  
members of  
committee.

IN WITNESS, &c.

#### SCHEDULE I.

Particulars of the debtor's freehold property with incumbrances, &c., affecting the same.

#### SCHEDULE II.

Copyholds, with incumbrances (*as above*).

#### SCHEDULE III.

Leaseholds, with incumbrances, &c. (*as above*).

#### SCHEDULE IV.

Shares and other personal property.

#### SCHEDULE V.

Property intended to be excluded:—Onerous leaseholds, interest in onerous contracts, debtor's tools of trade, wearing apparel and bedding of self and family.

#### SCHEDULE VI.

Names of creditors and amounts of debts.

MEMORANDUM to be indorsed on the Instrument where it is intended to be delivered as an Escrow (*b*).

Memorandum where instrument to be escrow. The within written indenture is deposited by the within named A. B. with S. (*debtor's solicitor*), who is to deliver it to the within named

(a) Even should these words be omitted, the appointment of a new trustee should, where practicable, be by deed, and should contain a declaration that the property subject to the trust shall vest in the person so appointed (Conv. Act, 1881, sec. 34). This declaration will not operate to vest in the trustee copyholds or shares in companies (*ib. sec. 34 (3)*).

(b) It should be borne in mind that though the delivery of the instrument as an escrow will prevent its being treated as an act of bankruptcy until the condition is fulfilled (*Bowker v. Burdekin*, 11 M. & W. 129, 147), yet the instrument will remain liable to be set aside as an act of bankruptcy until the expiration of three months from the time when the condition was fulfilled and the instrument operated as a deed.

C. D. if all the creditors of the said A. B. whose several debts exceed £50 shall have executed or acceded to the same; but in case all such last-mentioned creditors shall not within six months from the date hereof execute or accede to the same, S. is to deliver the said indenture to the same A. B. to be cancelled. In the meantime it is to remain in the hands of the said S. for the purpose of obtaining the execution or assent of the said creditors (a).

No. II.

SHORT FORM of ASSIGNMENT FOR BENEFIT OF CREDITORS by SINGLE DEBTOR—POWER OF ATTORNEY (*irrevocable for one year*) to Trustee to surrender copyholds and assign leaseholds—RELEASE—PROVISOS reserving benefit of SECURITIES, &c.

1. THIS INDENTURE made the — day of — 18—, BETWEEN A. B. of, &c. (*debtor*) of the 1st part, C. D. of, &c. (*trustee*) of the 2nd part, and the several persons, companies, and firms whose names and seals are hereunder signed and affixed respectively, being creditors of the said A. B., and all other creditors of the said A. B. acceding hereto (hereinafter called “the creditors”) of the third part

2. WHEREAS the said A. B. is indebted to the said creditors in the several sums set opposite to their respective names in the 1st Schedule hereunder written

Recital of debts.

3. AND WHEREAS (*recital of agreement to make assignment, ante, p. 205, clause 7*)

4. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreements and in consideration of the premises the said A. B. hereby conveys and assigns unto the said C. D., his heirs, executors, and administrators All and singular, the real and personal property, credits, and effects of the said A. B. to which he is beneficially entitled, whether in possession, reversion, remainder, or expectancy, except such parts thereof as are of copyhold tenure or are specified in the 2nd Schedule hereto

1st testament.  
Assignment of property.

5. TO HOLD the same Unto and to the use of the said C. D., his heirs, executors, and administrators, according to the respective nature and tenure thereof, and subject to the mortgages and charges now affecting the same respectively UPON the TRUSTS and subject to the provisos and agreements hereinafter declared concerning the same respectively

Habendum.

6. AND THIS INDENTURE FURTHER WITNESSETH that in further pursuance of the said agreements and in consideration of the premises, the

2nd testament.  
Power of attorney

(a) For the form of attestation where an instrument is delivered as an escrow, see 3 Byth. & Jarm. Prec. \* p. 30.

No. II.  
to sur-  
render  
copyholds,

and assign  
leaseholds.

Power to  
be irrevocable.

45 & 46  
Vict. c. 39,  
s. 9.

44 & 45  
Vict. c. 41,  
s. 47.

said A. B. hereby appoints (a) the said C. D. or other the trustee of these presents (hereinafter called "the trustee") his attorney for the purposes hereinafter expressed (that is to say): To surrender all the copyhold and customary hereditaments and premises of or to which the said A. B. is possessed or entitled, in possession, reversion, remainder, or expectancy, into the hands of the lords or ladies of the respective manors, whereof the same are holden according to the respective customs of the said manors To such uses as the said trustee shall think fit [but subject to the charges and incumbrances now affecting the same respectively] AND to sell, surrender, sublet, or otherwise dispose of the leasehold hereditaments, and other property specified in the said 2nd Schedule hereto as and when the trustee shall think fit AND for and in the name of the said A. B. to enter into and execute all contracts and deeds, and to do and perform all acts and things for any of the purposes aforesaid

7. AND it is hereby AGREED and DECLARED that the said power of attorney hereinbefore contained is and shall be irrevocable for the space of one year from the date hereof (b)

(a) If preferred the debtor might covenant to surrender and assign these premises respectively, as *above*, p. 206, clause 10.

(b) By the Conv. Act, 1882, sec. 9, it is provided that "if a power of attorney, whether given for a valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then in favour of a purchaser,—

- (i) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the . . . bankruptcy of the donor of the power; and
- (ii) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the . . . bankruptcy of the donor of the power, had not been done or happened; and
- (iii) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the . . . bankruptcy of the donor of the power within that fixed time.

It would seem, however, that if the donee of the power exercised it after notice of an "available act of bankruptcy" (Bankruptcy Act, 1883, sec. 168 (1), 43 and 49), although the purchasers would be protected by the above-quoted section, yet there would be nothing to prevent a bankruptcy trustee suing the donee of the power for the damages occasioned by such exercise of the power, which would not be protected by sec. 47 of the Conv. Act, 1881, which provides that "any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become . . . bankrupt or had revoked the power, if the fact of death, . . . bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same." It is pro-



8. AND the said A.B. hereby ratifies and confirms and covenants with the said trustee that he will, if and when required by him, ratify and confirm whatsoever the said trustee shall do or purport to do by virtue of the said power. And the said A. B. further covenants with the trustee that he will not without the consent of the trustee sell, dispose of, charge, or incur the said premises hereinbefore subjected to such power or any part thereof

No. II.

Covenant to ratify acts done under the power.

9. AND it is hereby AGREED and DECLARED that the said trustee shall stand possessed of the hereditaments and premises hereinbefore conveyed [and shall exercise the powers hereinbefore contained in reference to the hereditaments and premises subject thereto respectively] UPON TRUST at such time and in such manner as he shall think fit to call in, collect, compel payment of, and receive such parts of the said premises as are outstanding, and to sell (a) and convert into money such parts thereof as do not consist of money. AND shall stand possessed of the net proceeds of sale (subject to the payment thereof of such sums (if any) as may be due to incumbrancers concurring in such sales respectively), and of all other moneys which shall come to his hands under or by virtue of the trusts or powers herein contained 10-12 UPON TRUST (*trusts for payment of costs and preferential claims, and rateable distribution, ut ante, p. 207, clauses 13-15*) 13. AND it is hereby DECLARED that (*provision for trustee's remuneration, ut ante, p. 207, clause 16*)

Trusts for conversion and sale.

Trusts of proceeds.

14. PROVIDED ALWAYS and it is hereby AGREED and DECLARED that notwithstanding the said trust for conversion and sale hereinbefore contained, it shall be lawful for the trustee to postpone the sale, conversion, and collection of the whole or any part or parts of the said premises respectively for such time as he at his discretion shall think fit

Power to delay sale and collection.

15. AND in the meantime, and until the said premises respectively shall have been called in, collected, sold, and converted into money as aforesaid, it shall be lawful for the trustee at his discretion to manage, employ, repair, and insure against damage, or loss by fire or otherwise, at the cost of the trust estate, all or any part of the said premises

To insure and manage premises.

15A. [AND it shall be lawful for the trustee to carry on the business which the said A. B. has hitherto carried on, and for such last-mentioned purpose to make such advances out of the premises for the time being subject to the trusts of these presents as he shall think fit]

Power to carry on business.

16. AND it shall be lawful for the trustee to allow the said A. B. to retain possession of all or any of the said premises specified in the

Power to allow debtor to retain excepted property.

bable that this power might be regarded as one given for valuable consideration within sec. 8 of the Conv. Act, 1882, but as it is doubtful whether the Court will give a liberal interpretation to that section, it seems advisable to declare the power to be irrevocable for the space of one year only, which will probably afford sufficient time for its exercise.

(a) See *ante*, p. 206, n (b).

No. II. Second Schedule hereto, either permanently or for such time as the trustee shall think fit

17. AND it is hereby AGREED and DECLARED (*all debts provable in bankruptcy to be provable under the deed, ante, p. 208, clause 21*)

18. AND THIS INDENTURE FURTHER WITNESSETH that (*Release by Creditors, ante, p. 208, clause 22*)

Release not  
to prejudice  
securities,  
&c.

19. PROVIDED ALWAYS and it is hereby AGREED and DECLARED that these presents shall not in any way prejudice or affect the rights or remedies of the said creditors against any surety or sureties or any person or persons other than the said A. B. Nor shall these presents in anywise prejudice or affect any security which any of the said creditors may have or claim for his debt. But nevertheless, if such security shall be enforceable against the said A. B. or his effects, then in that case such creditor (unless he shall consent to abandon his said security) shall be entitled to receive dividends hereunder upon so much only of the said secured debt as may remain after such security shall have been realised or after credit shall have been given for the full value thereof, such value to be first agreed upon between such secured creditor and the trustee, or in case of dispute to be ascertained by two impartial valuers, one to be chosen by such secured creditor, and the other by the trustee, or an umpire to be named by such valuers before proceeding to the reference

Valuation  
of  
securities.

Arbitra-  
tion.

New  
trustees.

20. AND it is also DECLARED that the power of appointing new trustees conferred by Statute shall for the purposes of these presents be vested in a majority in number of the said creditors, representing in value more than a moiety of the debts ranking for dividend hereunder

IN WITNESS, &c. (a).

SCHEDULE I. above referred to.

Names of creditors with amounts of debts.

SCHEDULE II. above referred to.

Property intended to be excluded (*ut ante, p. 210, Sched. V.*)

No. III.

No. III.

ASSIGNMENT by TWO PARTNERS of their JOINT and SEPARATE estates to TWO TRUSTEES for benefit of JOINT and SEPARATE CREDITORS.—COVENANTS to surrender copyholds and to assign leaseholds as directed.—RELEASE by creditors.—PROVISOS reserving benefit of SECURITIES.

1. THIS INDENTURE made the — day of —, BETWEEN A. of &c., and B. of &c. (*debtors*), carrying on the trade of — at

(a) With regard to delivery of the instrument as an escrow, see *ante, p. 210*.

— under the style or firm of A. B. & Co., of the first part; C. of &c., and D. of &c. (*trustees*), of the second part, &c., and the several persons, companies, and co-partnership firms, whose names and seals are hereunder signed and affixed respectively, being creditors of the said firm of A. B. & Co., or of the said A. or B. separately, and all other creditors of the said firm, or of the said A. or B., acceding hereto (hereinafter called "the creditors") of the third part

No. III.

2. WHEREAS the said A. and B. are jointly indebted to such of the said creditors as are specified in the First Schedule hereto in the sums set opposite to their respective names in the said First Schedule, and the said A. is separately indebted to such of the said creditors as are specified in the Second Schedule, in the sums set opposite to their respective names in the said Second Schedule, and the said B. is separately indebted to such of the said creditors as are specified in the Third Schedule in the sums set opposite to their respective names in the said Third Schedule

Recital of debts

3. AND WHEREAS it has been agreed that the said A. and B. shall make the assurance, and enter into the covenants hereinafter contained, and that the said creditors shall accept these presents in satisfaction of their respective debts and execute the release hereinafter contained

of agreement to execute deed.

4. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreements, and in consideration of the premises, the said A. and B. hereby respectively as BENEFICIAL OWNERS convey and assign unto the said C. and D., their heirs, executors, and administrators, all the real and personal property, credits, and effects, to which they are respectively beneficially entitled, whether in possession, reversion, remainder, or expectancy except such parts thereof as are [of copyhold tenure or are] specified in the Fourth Schedule hereto

1st testament—assignment by debtors.

5. To HOLD the same Unto and to the use of the said C. and D., their heirs, executors, and administrators, according to the respective tenure and nature of the said property, and subject to the mortgages and charges now affecting the same respectively Upon the trusts, and subject to the provisos and agreements hereinafter declared concerning the same respectively

Habendum.

6. [AND THIS INDENTURE FURTHER WITNESSETH that in further pursuance of the said agreements, and for the consideration aforesaid, the said A. and B. respectively as BENEFICIAL OWNERS, covenant with the said C. and D., or other the trustees or trustee of these presents (hereinafter called the "trustees or trustee"), that they the said A. and B. respectively, and all other necessary parties, if any, will forthwith, &c., covenant to surrender copyholds, ante, p. 206, clause 10, mutatis mutandis]

[Covenant to surrender copyholds.]

7. AND THIS INDENTURE FURTHER WITNESSETH that in further pursuance of the said agreements, and in consideration of the premises, the

2nd testament.

- No. III. said A. and B. respectively hereby covenant with [the said C. and D., and each of them or other the trustees or trustee of these presents herein-after called (a)] the trustees or trustee, that they the said A. and B. respectively will forthwith at the request of the trustees or trustee, but at the cost of the trust estate, convey, transfer, and assign their respective interests in all or any of the said premises specified in the said Fourth Schedule hereto at such times and in such manner as the said trustees or trustee shall direct. And that they respectively will not in the meantime without the consent of the trustees or trustee sell, dispose of, charge, or incur the same, or any part thereof.
- Covenant to assign excepted property, and not to encumber the same.
- Declaration of trusts. 8. AND it is hereby AGREED AND DECLARED that the trustees or trustee shall stand possessed of the hereditaments and premises hereby conveyed [and covenanted to be surrendered respectively] UPON TRUST at such time and in such manner as they or he shall think fit [*continue, ut ante*, p. 213, clause 9 *mutatis mutandis*]
- Payment of costs. 9. UPON TRUST, to pay or retain thereout all costs, charges, and expenses, of or incidental to the negotiation, preparation, and execution of these presents, or the carrying of the trusts and powers hereof into effect.
- Preferential claims. 10. And, in the next place, to pay all claims which are by law entitled to be paid in full in priority to other debts in case of bankruptcy, and out of the portions of the said moneys whereout in case of bankruptcy the same would have been payable.
- Rateable distribution. 11. And to pay and distribute the residue of the said moneys unto and among the said creditors in like manner as the same would have been distributable under an adjudication of bankruptcy against the said A. and B. And to pay the surplus after payment of the said creditors respectively unto the said A. and B. respectively.
- Trustees' remuneration. 12. AND it is hereby DECLARED that the said trustees or trustee shall be entitled to retain by way of remuneration for their or his services in carrying these presents into effect (b) a commission of £1 per cent. on the net sum realised by the collection and sale of the said premises respectively (exclusive of any part of the proceeds of any sale paid to incumbrancers concurring in such sale and exclusive also of assets received and spent in carrying on the said business of the said A. and B.) and a commission of £— per cent. on the amount rateably distributed among the creditors under the trusts hereinbefore expressed, and the amount of such commissions shall be divided among the trustees for the time being (if more than one) equally, unless they shall otherwise agree.
- (a) If the expression "trustees or trustee" has already been defined in the previous clause, the words within the brackets will be omitted.  
(b) For other modes of remuneration, see *ante*, p. 207, clause 16.

13. PROVIDED ALWAYS and it is hereby AGREED AND DECLARED, that, notwithstanding the said trust for conversion and sale hereinbefore contained, it shall be lawful for the trustees or trustee to postpone the sale, conversion, and collection of the whole or any parts of the said premises respectively for such time as they or he at their or his discretion shall think fit No. III.  
Power to delay sale and collection.
14. AND in the meantime, and until the said premises respectively shall have been called in, collected, sold, and converted into money as aforesaid, it shall be lawful for the trustees or trustee at their or his discretion to manage, employ, repair, and insure against damage or loss by fire or otherwise, all or any part of the said premises respectively, at the cost of the respective trust estate to which the same belong Power to insure.
15. AND it shall be lawful for the trustees or trustee to carry on the business which the said A. and B. have hitherto carried on, and for such last-mentioned purpose to make such advances out of the joint-estate of the said A. and B. for the time being subject to the trusts of these presents as the trustees or trustee shall think fit Power to carry on business.
16. AND it shall be lawful for the trustees or trustee to allow the said A. B. to retain possession of all or any of the said premises specified in the Fourth Schedule hereto, either permanently or for such time as the trustees or trustee shall think fit Trustees may allow debtor to retain certain property.
17. AND it is hereby AGREED AND DECLARED (*debts to be debts provable in bankruptcy, ante, p. 208, clause 21*) 3rd testamentum.  
Release.
18. AND this INDENTURE ALSO WITNESSETH that in further pursuance of the said agreements, and in consideration of the premises, the said creditors hereby respectively release the said A. and B., and each of them, from the said debts and from all other debts (if any) owing from the said A. or B. to them respectively, in respect whereof they would be entitled to receive dividends under these presents
19. PROVIDED ALWAYS, and it is hereby AGREED AND DECLARED, that nothing herein contained shall prevent the said creditors or any of them from enforcing or otherwise obtaining the full benefit of any charge or lien which they now have on any property or effects whatever, or from suing any person or persons (other than the said A. and B.) who may be liable to pay to any of the said creditors all or any part of their respective debts Release not to prejudice securities or remedies against third persons.
20. PROVIDED ALWAYS that any creditor who may have any charge or lien on or against the joint estate of the said A. and B., or the separate estate of either of them, shall be entitled to receive dividends hereunder out of the estate whereon he has such charge or lien on and in respect of the balance of his debt only, after realising and allowing for or valuing and deducting the value of such last-mentioned charge or lien and PROVIDED ALSO that any creditor neglecting to realise or value such Valuation or abandonment of securities.

No. III. last-mentioned charge or lien prior to receiving dividends hereunder out of the estate whereon he has such charge or lien shall be taken to have abandoned such last-mentioned charge or lien

21. PROVIDED ALWAYS (*Revaluation of securities; ante*, p. 209, clause 25)

Verifica-  
tion of  
debts.

22. [AND it is hereby AGREED AND DECLARED that all creditors before becoming entitled to receive any dividend shall (if required so to do by the trustees or trustee) deliver to them or him a written statement, signed by such creditors respectively, of their debts or claims (*continue ut ante*, p. 209, clause 26)]

Arbitra-  
tion.

23. AND it is hereby AGREED AND DECLARED that, in case any dispute, doubt, or question shall arise between the trustees or trustee and any of the said creditors (*continue ut ante*, p. 209, clause 27) [*if desired, power to appoint new trustees, ante*, p. 214, clause 20]

IN WITNESS, &c.

#### SCHEDULE I.

Joint creditors of A. and B. and amount of debts.

#### SCHEDULE II.

Separate creditors of A. and amount of debts.

#### SCHEDULE III.

Separate creditors of B. and amount of debts.

#### SCHEDULE IV.

Property intended to be excluded, *as above*, p. 210, Sched. V.

No. IV.

No. IV.

COMPOSITION DEED.—*Joint and several COVENANTS of DEBTOR and SURETY with trustee to pay composition to trustee.—RELEASE by creditors defeasible on default in performance of covenant.—ASSIGNMENT of BOOK DEBTS to indemnify SURETY.—PROVISOS that release shall not prejudice SECURITIES, &c.—On avoidance of deed DEBTOR agrees to PAY DEBTS IN FULL or to waive STATUTE of LIMITATIONS.*

Parties.

1. THIS INDENTURE made, &c., BETWEEN A. B. of, &c. (*debtor*), of the first part; C. D. of, &c. (*surety*), of the second part; E. F. of, &c. (*trustee*), of the third part, and the several persons, companies, and firms, whose names and seals are hereunder signed and affixed respectively, being creditors of the said A. B., and all other creditors of the said A. B. acceding hereto (hereinafter called "the creditors") of the fourth part

2. WHEREAS the said A. B. is indebted or liable to the said creditors in or for the several sums of money set opposite to their respective names in the Schedule hereto
3. AND WHEREAS it has been agreed that the said A. B. shall pay to the said creditors a composition of 15s. in the pound on the amount of their said respective debts, to be secured and paid in the manner hereinafter appearing
4. AND WHEREAS the said creditors have agreed with the said A. B., and mutually each with the others to accept such composition in satisfaction of their debts, and to execute the release hereinafter contained
5. AND WHEREAS the said C. D. has agreed to join in these presents in manner hereinafter appearing
- 5A. [AND WHEREAS, in consideration of the said C. D. so joining in these presents, the said A. B. has agreed to execute the assignment hereinafter contained]
6. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreements, and in consideration of the premises and of the release hereinafter contained, the said A. B. and C. D. jointly and severally covenant with the said E. F., or other the trustee for the time being of these presents (hereinafter called "the trustee"), that they or one of them will pay to the said trustee, in trust for the said creditors, such a sum as shall be equal to 15s. in the pound, on the total amount of the debts specified in the Schedule hereto, by two equal instalments, the first of such instalments to be paid on the — day of — next, and the second instalment on the — day of — next
7. AND ALSO that they or one of them will, on demand in writing by the trustee, pay all costs, charges, and expenses of, or incidental to, the preparation and execution of these presents and the carrying of the same into effect [*if the trustee agrees to accept a fixed sum*, including the sum of £— as the trustee's remuneration for his services in relation to the trusts hereof]
8. PROVIDED ALWAYS, and it is hereby AGREED AND DECLARED that, although as between the said A. B. and the said C. D. the said C. D. is surety only for the payment of the said composition, nevertheless, as between the said C. D. and the said E. F. and the said creditors, the said C. D. shall be deemed and taken to be a principal debtor, so that he shall not be discharged from his liability by reason of time being given to, or any arrangement made with, the said A. B. without his consent, or by reason of any other circumstance which would or might have the effect of discharging him if he were surety only
9. AND THIS INDENTURE FURTHER WITNESSETH that in pursuance of the said agreements, and in consideration of the covenants hereinbefore contained, the said creditors hereby respectively release the said A. B.

No. IV.

Recital of debts.

Agreement to pay composition.

Agreement to accept composition.

Agreement of surety.

Agreement to indemnify surety.

Joint and several covenant by debtor and surety with trustee to pay composition.

And to pay costs, charges and expenses.

Surety to stand in position of principal towards creditors.

Release.

No. IV. from their respective debts, the amounts whereof are specified in the Schedule hereto, and from all other debts (if any) owing from the said A. B. to the said creditors respectively, subject, nevertheless, to the provisos hereinafter contained

Proviso that release not to prejudice securities or remedies against third persons. 10. PROVIDED ALWAYS, and it is hereby AGREED AND DECLARED, that nothing herein contained shall prevent the said creditors or any of them from enforcing or otherwise obtaining the full benefit of any charge or lien which they respectively now have upon any estate or effects whatsoever, or from suing any person or persons other than the said A. B., who may be liable to pay to any of the said creditors all or any part of their respective debts

Proviso that creditors shall value securities and take dividends on balance, or abandon securities. 11. PROVIDED ALWAYS (a) that as to any debt or debts for which any creditor or creditors may at the date of these presents have any charge or lien upon any estate or effects of the said A. B., such creditor or creditors respectively shall be entitled to receive the composition hereinbefore provided on and in respect of the balance of such debt or debts only after realising and allowing for or valuing and deducting the value of such charges or liens as aforesaid, and Provided also that any creditor neglecting to realise or value such last-mentioned charge or lien prior to receiving the said composition shall be taken to have abandoned such charge or lien

Assignment of book debts to indemnify surety. 11. [AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreements, and in consideration of the premises and of the said C. D. entering into the covenants hereinbefore contained, the said A. B., as beneficial owner, hereby assigns unto the said C. D. ALL the book and other debts (b) now due and owing to him in his trade or business of — carried on by him at — and all securities for the same To HOLD the same to the said C. D. upon trust, to receive the amount of the said debts, and out of the same to pay in the first place the expenses attending the obtaining payment thereof, and to apply the residue thereof TO THE END and intent that the said C. D. shall and may at all times hereafter be indemnified against the sums hereinbefore covenanted by him to be paid and every part thereof, and against all claims and demands for and in respect of the same, with and by means of the said premises hereby conveyed and the proceeds thereof AND subject to the trust and purposes aforesaid upon trust for the said A. B. absolutely]

Proviso for avoidance of deed on default. 12. PROVIDED ALWAYS, and it is hereby AGREED AND DECLARED, that in case there shall be default in the performance of any covenants on

(a) As to the effect of this proviso see *Bolton v. Ferro*, 14 Chy. D. 171.

(b) See *Burlinson v. Hall*, 12 Q. B. D. 347. If the property assigned to the surety amount to substantially the whole of the debtor's property, it will be an act of bankruptcy: *Re Marshall*, De Gez, 273; *Leake v. Young*, 5 E. & B. 955.



the part of the said A. B. or C. D. to be observed or performed, then in such case as to any creditor in respect of whom such default shall have been made, these presents shall (but without prejudice to the agreement hereinafter contained or to anything theretofore done in pursuance hereof) thenceforth be voidable at the election of such creditor

13. AND it is hereby AGREED AND DECLARED, that in the event of the avoidance of these presents as against any creditor executing or acceding to the same by virtue of the proviso in that behalf hereinbefore contained, then the said A. B. will pay to such creditor the full amount of his debt less the amount which may have been received by him on account thereof under these presents or otherwise (a)

No. IV.  
If deed avoided debtor agrees to pay debts in full.

[or, then the said A. B. will not during a period of six years from the date of these presents set up or claim the benefit of any of the Statutes of Limitations in defence to any action brought by such creditor in respect of any debt hereinbefore released] (b)

Or, not to set up Statute of Limitations. Instrument to be absolute.

14. AND it is HEREBY AGREED AND DECLARED that these presents shall be binding on all creditors executing the same, although some creditors of the said A. B. may not execute these presents (c)

IN WITNESS, &c.

#### SCHEDULE.

No. V.

No. V.

COMPOSITION DEED. — *Composition payable by instalments — Secured by COVENANTS of DEBTOR and SURETY — Joint and several promissory notes — DEFEASIBLE RELEASE — ASSIGNMENT of BOOK DEBTS to indemnify SURETY — SURETY to CONTINUE LIABLE on avoidance of the deed.*

1. THIS INDENTURE, made, &c., BETWEEN (*Parties same as in No. 4, ante*, p. 218, clause 1)

2. WHEREAS (*Recital of debts, ante*, p. 219, clause 2)

3, 4. *Recitals of agreement to pay composition, and agreement to accept same, ante*, p. 219, clauses 3 and 4

(a) This being a promise *under seal*, will support an action at any time within twenty years after default. If any objection to this provision is felt, the alternative provision in the next clause may be adopted, but see next note.

(b) See *per* Lord Romilly, M.R., in *Fuller v. Redman* (No. 2), 26 Beav. 614, *ante*, p. 65, and *per* Lord Campbell in *The East India Co. v. Paul* (7 Moo. P. C. C. 85, 112), *ante*, p. 200, n (a).

(c) This clause is not actually necessary, and may be omitted without altering the effect of the instrument. It serves, however, to give the creditors notice that the agreement is absolute and not conditional on the accession of all the creditors.

No. IV.

from their respective debts, the amounts whereof are specified in the Schedule hereto, and from all other debts (if any) owing from the said A. B. to the said creditors respectively, subject, nevertheless, to the provisions hereinafter contained

Proviso that release not to prejudice securities or remedies against third person.

10. PROVIDED ALWAYS, and it is hereby AGREED AND DECLARED, that nothing herein contained shall prevent the said creditors or any of them from enforcing or otherwise obtaining the full benefit of any charge or lien which they respectively now have upon any estate or effects whatsoever, or from suing any person or persons other than the said A. B., who may be liable to pay to any of the said creditors all or any part of their respective debts

Proviso that creditors shall value securities and take dividends on balances, or abandon securities.

11. PROVIDED ALWAYS (a) that as to any debt or debts for which any creditor or creditors may at the date of these presents have any charge or lien upon any estate or effects of the said A. B., such creditor or creditors respectively shall be entitled to receive the composition hereinbefore provided on and in respect of the balance of such debt or debts only after realising and allowing for or valuing and deducting the value of such charges or liens as aforesaid, and Provided also that any creditor neglecting to realise or value such last-mentioned charge or lien prior to receiving the said composition shall be taken to have abandoned such charge or lien

Assignment of book debts to indemnify surety.

11. [AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreements, and in consideration of the premises and of the said C. D. entering into the covenants hereinbefore contained, the said A. B., as beneficial owner, hereby assigns unto the said C. D. ALL the book and other debts (b) now due and owing to him in his trade or business of — carried on by him at — and all securities for the same To HOLD the same to the said C. D. upon trust, to receive the amount of the said debts, and out of the same to pay in the first place the expenses attending the obtaining payment thereof, and to apply the residue thereof TO THE END and intent that the said C. D. shall and may at all times hereafter be indemnified against the sums hereinbefore covenanted by him to be paid and every part thereof, and against all claims and demands for and in respect of the same, with and by means of the said premises hereby conveyed and the proceeds thereof AND subject to the trust and purposes aforesaid upon trust for the said A. B. absolutely]

Proviso for avoidance of deed on default.

12. PROVIDED ALWAYS, and it is hereby AGREED AND DECLARED, that in case there shall be default in the performance of any covenants on

(a) As to the effect of this proviso see *Bolton v. Ferro*, 14 Chy. D. 171.

(b) See *Burlinson v. Hall*, 12 Q. B. D. 347. If the property assigned to the surety amount to substantially the whole of the debtor's property, it will be an act of bankruptcy: *Re Marshall*, De Gex, 273; *Leake v. Young*, 5 E. & B. 955.

the part of the said A. B. or C. D. to be observed or performed, then in such case as to any creditor in respect of whom such default shall have been made, these presents shall (but without prejudice to the agreement hereinafter contained or to anything theretofore done in pursuance hereof) thenceforth be voidable at the election of such creditor

No. IV.

13. AND it is hereby AGREED AND DECLARED, that in the event of the avoidance of these presents as against any creditor executing or acceding to the same by virtue of the proviso in that behalf hereinbefore contained, then the said A. B. will pay to such creditor the full amount of his debt less the amount which may have been received by him on account thereof under these presents or otherwise (a)

If deed avoided debtor agrees to pay debts in full.

[or, then the said A. B. will not during a period of six years from the date of these presents set up or claim the benefit of any of the Statutes of Limitations in defence to any action brought by such creditor in respect of any debt hereinbefore released] (b)

Or, not to set up Statute of Limitations.

14. AND it is HEREBY AGREED AND DECLARED that these presents shall be binding on all creditors executing the same, although some creditors of the said A. B. may not execute these presents (c)

Instrument to be absolute.

IN WITNESS, &c.

SCHEDULE.

No. V.

No. V.

COMPOSITION DEED. — *Composition payable by instalments — Secured by COVENANTS of DEBTOR and SURETY — Joint and several promissory notes — DEFEASIBLE RELEASE — ASSIGNMENT of BOOK DEBTS to indemnify SURETY — SURETY to CONTINUE LIABLE on avoidance of the deed.*

1. THIS INDENTURE, made, &c., BETWEEN (*Parties same as in No. 4, ante*, p. 218, clause 1)

2. WHEREAS (*Recital of debts, ante*, p. 219, clause 2)

3, 4. *Recitals of agreement to pay composition, and agreement to accept same, ante*, p. 219, clauses 3 and 4

(a) This being a promise *under seal*, will support an action at any time within twenty years after default. If any objection to this provision is felt, the alternative provision in the next clause may be adopted, but see next note.

(b) See *per Lord Romilly, M.R.*, in *Fuller v. Redman* (No. 2), 26 Beav. 614, *ante*, p. 65, and *per Lord Campbell* in *The East India Co. v. Paul* (7 Moo. P. C. C. 85, 112), *ante*, p. 200, n (a).

(c) This clause is not actually necessary, and may be omitted without altering the effect of the instrument. It serves, however, to give the creditors notice that the agreement is absolute and not conditional on the accession of all the creditors.

- No. V. 5 and 5A. *Recital of agreement of surety, and (if so) agreement to indemnify surety, ante, p. 219, clauses 5 and 5a*
- 6, 7. NOW THIS INDENTURE WITNESSETH (*joint and several covenants by debtor and surety, with the trustee, to pay composition and costs, charges, and expenses, ante, p. 219, clause 6; p. 219, clause 7*)
- Covenant to make and deliver to trustee promissory notes. 8. AND will forthwith make and deliver to the said trustee (upon trust to be delivered on demand to the respective creditors) joint and several promissory notes of the said A. B. and C. D. drawn in favour of each of the said creditors for the respective amounts of the instalments of the said composition payable to such creditor, such promissory notes to be made payable on the respective days hereinbefore provided for the payment of such instalments
- Proviso that creditor receiving a promissory note shall be paid composition only on cancelling note. 9. PROVIDED ALWAYS, and it is HEREBY AGREED AND DECLARED, that no creditor to whom such note shall have been delivered as aforesaid, shall be entitled to receive payment from the trustee of the amount secured by such note without the production and delivery up of the said note for cancellation, but in the event of any creditor neglecting or refusing to deliver up any such note upon tender of the amount secured thereby, then the trustee shall stand possessed of the sum secured by the said note upon trust to answer any demand which shall be made by any holder of such note
10. PROVIDED ALWAYS, and it is HEREBY AGREED AND DECLARED (*surety to stand in position of principal, ante, p. 219, clause 8*)
11. AND THIS INDENTURE ALSO WITNESSETH that (*Release by creditors, ante, p. 219, clause 9*)
12. PROVIDED ALWAYS (*proviso that release shall not prejudice securities, &c., ante, p. 220, clause 10*)
- Provisoes that creditors shall value and deduct, or abandon securities. 13. PROVIDED ALWAYS that any creditor who may have any charge or lien on any estate or effects of the said A. B. shall be entitled to receive the composition and promissory notes hereinbefore provided in respect of the balance only of his debt after allowing for and deducting the value of such last-mentioned charge or lien PROVIDED ALSO that any creditor neglecting to realise or value such last-mentioned charge or lien prior to receiving the said composition or promissory notes, shall be taken to have abandoned such last-mentioned charge or lien
- 13a. [AND THIS INDENTURE ALSO WITNESSETH (*assignment to indemnify surety, ante, p. 220, clause 11a*)
- Proviso for avoidance of deed on default. 14. PROVIDED ALWAYS, and it is hereby AGREED AND DECLARED, that in case there shall be default in the performance of any of the covenants on the part of the said A. B. or C. D. to be observed or performed, then in such case as to any creditor, in respect of whom such default shall have been made, these presents shall (subject to the proviso and agreement hereinafter contained) thenceforth be null and void PROVIDED, nevertheless, that such avoidance shall not affect anything theretofore done

in pursuance hereof, and shall not prejudice the right of such creditor to obtain the said promissory notes, and enforce payment thereof, in addition to any other remedies that he may have

15. AND it is hereby AGREED AND DECLARED (*agreement by debtor to pay debt in full or not to set up Statute of Limitations, supra*, p. 221, clause 13)

16. [AND it is HEREBY AGREED AND DECLARED (*instrument to be absolute, ante*, p. 221, clause 14)]

IN WITNESS, &c.

SCHEDULE.

No. VI.

COMPOSITION DEED.—DEBTOR and SURETY covenant to make PROMISSORY NOTES to secure composition of 15s. in the pound payable by two instalments—DEFEASIBLE RELEASE—On avoidance of deed SURETY to be INDEMNIFIED against FUTURE LIABILITY.

1. THIS INDENTURE made, &c., BETWEEN A. B. of, &c. (*debtor*), of the 1st part, C. D. of, &c. (*surety*), of the 2nd part And the several persons, companies, and firms whose names and seals are hereunder signed and affixed respectively, being creditors of the said A. B., and all other creditors of the said A. B. acceding hereto (hereinafter called "the creditors") of the 3rd part

2. WHEREAS (*Recital of debts, ante*, p. 219, clause 2)

3. AND WHEREAS it has been agreed that the said A. B. and C. D. shall make and deliver to the said creditors the promissory notes hereinafter mentioned, and that the said C. D. shall join in these presents in manner hereinafter appearing

4. AND WHEREAS the said creditors have agreed with the said A. B. and mutually each with the others to accept these presents and the provisions hereof in satisfaction of and to release their debts in manner hereinafter appearing

4a. [AND WHEREAS (*if so agreed*) recite agreement to indemnify surety, *ante*, p. 219, clause 5a]

5. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreements and in consideration of the premises and of the release hereinafter contained, the said A. B. and C. D. jointly and severally covenant with each of the said creditors that they will forthwith make and deliver to the said creditors respectively joint and several promissory notes of them, the said A. B. and C. D., to secure to them a composition of 15s. in the pound on the amount of their said respective debts by two equal instalments, such promissory notes to be drawn in

No. V.

Proviso that avoidance of deed shall not affect creditors' right to obtain and enforce promissory notes.

No. VI.

Recital of agreement to make promissory notes.

Recital of agreement to accept provisions of instrument in satisfaction of debts.

Joint and several covenant to make promissory notes.

- No. VI. favour of the said creditors respectively, and to be made payable on the — day of — next, and the — day of — next
6. PROVIDED ALWAYS and it is hereby AGREED AND DECLARED (*surety to stand in position of principal, ante, p. 219, clause 8*)
- Acceptance of satisfaction and release. 7. AND THIS INDENTURE ALSO WITNESSETH that in pursuance of the said agreements and in consideration of the premises, the said creditors hereby accept these presents and the provisions hereof in satisfaction of their respective debts (the amounts whereof are specified in the schedule hereto) and of all other debts (if any) owing from the said A. B. to the said creditors respectively, and hereby respectively release the said debts, subject, nevertheless, to the provisos hereinafter contained
8. PROVIDED ALWAYS (*proviso that release shall not prejudice securities, &c., ante, p. 220, clause 10*)
9. (*Provisoes for valuation or abandonment of securities, ante, p. 222, clause 13*)
- 9a. [AND THIS INDENTURE ALSO WITNESSETH (*assignment to indemnify surety, ante, p. 220, clause 11a*)]
- On default deed to be voidable at creditor's election. 10. PROVIDED ALWAYS and it is hereby agreed and declared, that in case any of the said notes shall not be paid as and when they respectively become due and payable, the same having been lawfully demanded, or in case there shall be any default on the part of either of the said A. B. or C. D. in the performance of the covenant hereinbefore contained, then in such case as to any creditor in respect of whom such default shall have been made, these presents shall (subject to the proviso and agreement hereinafter contained) be voidable at his election (but without prejudice to any acts that may have been theretofore done in pursuance hereof)
- Creditors electing to avoid the deed to discharge surety. 11. PROVIDED nevertheless, and it is hereby AGREED AND DECLARED, that in case any creditor shall elect to avoid these presents under the proviso lastly hereinbefore contained, then the said C. D. shall thenceforth stand released from all further liability under the covenants hereinbefore contained, or upon any promissory note (not then already due) made in pursuance of the said covenants in favour of such creditor as aforesaid And such creditor shall erase, or cause to be erased, from any such promissory note not already due the name of the said C. D. (without prejudice, nevertheless, to the rights of such creditor against the said A. B.), and shall indemnify the said C. D. against all liability on such note
12. AND it is hereby AGREED AND DECLARED (*agreement by debtor to pay debt in full or not to set up Statute of Limitations, ante, p. 221, clause 13 ; [Agreement that instrument is absolute, p. 221, clause 14]*)

IN WITNESS, &c.

SCHEDULE.

## No. VII.

## No. VII.

COMPOSITION DEED.—COVENANTS *by* DEBTOR *with trustee* TO PAY ONE-THIRD *of net income of business to trustee by quarterly payments.*—TRUSTEE *to APPLY MONEYS in payment of a COMPOSITION of 10s. in the pound to the creditors.*

1. THIS INDENTURE made, &c., BETWEEN (*Parties the same as in No. II., ante, p. 211, clause 1*)

2. WHEREAS the said A. B. is engaged in the profession or business of a — at — Recital of business.

3. AND WHEREAS (*recital of debts, ante, p. 219, clause 2*)

4. AND WHEREAS the said A. B. has agreed to pay to the said creditors a composition of 10s. in the pound on the amount of their respective debts, and to enter into the covenants hereinafter contained Recital of agreement to pay composition.

5. AND WHEREAS (*recital of agreement to accept provisions of instrument in satisfaction of debts, ante, p. 223, clause 4*)

6. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreements, and in consideration of the release to the said A. B. hereinafter contained, the said A. B. doth hereby covenant with the said C. D., or other the trustee for the time being of these presents (hereinafter called "the trustee"), that he will four times in each year, namely, in the months of January, April, July, and October (or oftener if required by the trustee) make, sign, and deliver to the trustee a full and complete statement of the receipts and payments taken and made respectively by him the said A. B. in respect of the said business during the three months then past Covenant to furnish statement of income.

7. AND that he will at all reasonable times afford to the trustee or his agent appointed for the purpose every facility for ascertaining the accuracy of such statement by the inspection of the books and accounts kept by the said A. B., and otherwise assist the trustee or such agent as aforesaid with all information in his power in reference thereto, and will verify such statement by statutory declaration or otherwise as the trustee may require To afford trustee facilities for examining books, &c.

8. AND that he will on the 15th day of each of the months aforesaid in every year, so long as these presents shall continue in force, pay to the trustee without any deduction whatsoever such a sum as shall be equal to one-third of the net earnings of the said business during the three months next preceding such days respectively To pay one-third of net income of business by quarterly payments.

9. AND that he will, in addition to such payments as aforesaid, pay and discharge the costs, charges, and expenses of and incidental to the negotiation, preparation, and execution of these presents, and of or to the carrying of the trusts and powers hereof into effect To pay costs.

Proviso  
that trustee  
may certify  
amount  
payable  
under  
covenant.

Trusts of  
sums paid  
under  
covenant.  
Payment  
of prefer-  
ential  
claims.

Release, &c.

10. PROVIDED ALWAYS, and it is hereby AGREED and DECLARED that it shall be lawful for the trustee to certify the amount of such net earnings as aforesaid for any such period as aforesaid, and such certificate shall be conclusive for the purpose of ascertaining the amount payable for such period by the said A. B. in pursuance of the covenant hereinbefore contained

11. AND it is hereby AGREED and DECLARED that the trustee shall stand possessed of all moneys which shall come to his hands under these presents, Upon trust, in the first place to pay all claims which would be entitled to be paid in full in priority to other debts in case of bankruptcy, and in the next place to pay to the said creditors by such instalments and at such times as the trustee shall think fit, a composition of ten shillings in the pound on the amount of their respective debts

12. AND THIS INDENTURE ALSO WITNESSETH (*acceptance of satisfaction and release, ante, p. 224, clause 7*)

13. PROVIDED ALWAYS (*proviso that release shall not prejudice securities, etc., ante, p. 220, clause 10*)

14. (*Provisoes for valuation or abandonment of securities, ante, p. 220, clause 11*)

Proviso  
that in  
certain  
events  
debtor's  
covenant  
shall  
determine.

15. PROVIDED ALWAYS, and it is hereby AGREED and DECLARED that, when and so soon as the said trustee shall have received hereunder such sums as will enable him to pay the said composition and make such other payments as aforesaid; then, subject to the proviso next hereinafter contained, the trusts of these presents shall cease, and the said A. B. shall be released from all further liability on the covenants hereinbefore contained

Deed to be  
void on  
default.

16. PROVIDED ALWAYS, and it is hereby AGREED and DECLARED that, in case there shall be default in performance of any of the covenants on the part of the said A. B., then these presents shall (but without prejudice to the agreement hereinafter contained or to anything theretofore done in pursuance hereof) thenceforth be voidable at the election of the creditors respectively

On avoidance  
of deed debtor  
agrees to,  
&c.

17. AND it is hereby AGREED and DECLARED that (*agreement to pay debts in full, or to waive Statute of Limitations, ante, p. 221, clause 13, mutatis mutandis*)

[18. AND it is, &c. (*agreement that instrument is to be absolute, ut ante, p. 221, clause 14*)]

IN WITNESS, &c.

SCHEDULE.



No. VIII.

No. VIII.

DEED OF COVENANT for PAYMENT OF DEBTS IN FULL—*Quarterly payments proportional to income*—*DEFESIBLE RELEASE.*

1. THIS INDENTURE made, &c., BETWEEN (*Parties same as in No. II., ante, p. 211, clause 1*)

2. WHEREAS (*recital of business, ut ante, p. 225, clause 2; recital of debts, ut ante, p. 219, clause 2*)

3. AND WHEREAS the said A. B. has agreed to pay his said creditors their respective debts in full, in manner hereinafter provided

Agreement to pay debts in full.

4. AND WHEREAS (*recital of agreement to accept provisions of instrument in satisfaction of debts, ante, p. 223, clause 4*)

5-8. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreements and in consideration of the premises, the said A. B. hereby covenants with the said C. D., or other the trustee for the time being of these presents (hereinafter called "the trustee"), that he will (*Covenants to furnish statement of income and to pay one-third of income to trustee, ut ante, p. 225, clauses 6 to 8; and to pay costs, charges, and expenses, ib., clause 9*)

Covenants.

9. PROVIDED ALWAYS (*proviso that trustee may certify amount payable under covenant, ante, p. 226, clause 10*)

10-12. AND it is hereby AGREED and DECLARED that the trustee shall stand possessed of all moneys which shall come to his hands under these presents UPON TRUST in the first place (*to pay preferential claims, ut ante, p. 207, clause 14; and for rateable distribution among creditors, p. 207, clause 15; debts to be debts provable in bankruptcy, ante, p. 208, clause 21*)

Trusts.

13. AND THIS INDENTURE ALSO WITNESSETH (*acceptance of satisfaction and release, ut ante, p. 224, clause 7*)

14, 15. PROVIDED ALWAYS (*Proviso that release shall not prejudice securities, ut ante, p. 208, clause 23; Provisoes for valuation or abandonment of securities, p. 209, clause 24*).

16. PROVIDED ALWAYS, and it is hereby AGREED and DECLARED, that when and so soon as the said trustee shall have received hereunder such sums as will enable him to make such payments as aforesaid, then the trusts of these presents shall cease, and the said A. B. shall be released from all further liability on the covenants hereinbefore contained

Debtor's liability on covenants to cease in certain events.

17. PROVIDED ALWAYS (*deed to be void on default, ut ante, p. 226, clause 16*)

18. AND it is hereby AGREED and DECLARED (*Agreement to pay debts in full in event of default, ut ante, p. 221, clause 13*)

IN WITNESS, &c.

SCHEDULE.

## No. IX.

## No. IX.

**ASSIGNMENT OF DEBTS** *by CREDITORS to a third person in consideration of an immediate payment (a).*

## Parties.

1. **THIS AGREEMENT**, made between the several persons, companies, and firms whose names [and seals] are hereunder signed [and affixed respectively], being creditors of A. B., party hereto (hereinafter called "the creditors"), of the first part; A. B. of, &c. (*debtor*), of the second part; and C. D. of, &c. (*purchaser*), of the third part

## Recital of debts.

2. **WHEREAS** the said A. B. is indebted to the said creditors in the several sums of money set opposite their respective names in the second column of the Schedule hereto

Agreement  
to assign  
debts.  
Assign-  
ment.

3. **AND WHEREAS** the said creditors have agreed to assign their said debts to the said C. D. for the consideration hereinafter appearing

4. **NOW THESE PRESENTS WITNESS** that in consideration of the several sums of money set opposite their respective names in the third column of the said Schedule to the said creditors respectively by the said C. D. now paid (the receipt whereof the said creditors respectively hereby acknowledge), the said creditors hereby assign unto the said C. D. All those debts now due and owing to them respectively from the said A. B., the amount whereof is set opposite to their respective names in the second column of the Schedule hereto, and all securities for the same, to **HOLD** the same unto the said C. D. absolutely.

IN WITNESS, &c.

**SCHEDULE.**

Name of Creditor.	Amount of Debt.	Amount Received.

## No. X.

**SHORT FORM of COMPOSITION DEED.**—*Creditors release debts in consideration of immediate payment of composition—Reservation and valuation of securities.*

## Parties.

1. **THIS INDENTURE**, made, &c., **BETWEEN** A. B. of, &c. (*debtor*), of

(a) Although it is in all cases desirable that the arrangements should be by deed it may in some cases be found impracticable. This form may be found useful in such cases.

the one part, and the several persons, companies, and firms whose names and seals are hereunder signed and affixed respectively, being creditors of the said A. B., and all other creditors of the said A. B. acceding hereto (hereinafter called "the creditors") of the other part

No. X.

2. WHEREAS (*Recital of debts, ante, p. 228, clause 2*)

3. AND WHEREAS the said A. B. has agreed to pay the said creditors a composition of 10s. in the pound on the amount of their respective debts in the manner hereinafter provided

Agreement for composition.

4. AND WHEREAS (*agreement by creditors, ante, p. 219, clause 4*)

5. AND WHEREAS it has been agreed that all creditors having a charge or lien upon any estate or effects of the said A. B. shall receive the said composition in respect of the balance only of their respective debts after deducting the value of such charge or lien

Agreement for valuation of securities.

6. AND WHEREAS such last mentioned creditors have accordingly valued their respective charges or liens at the several sums set opposite their respective names in the third column of the said schedule, leaving due to them as unsecured debts the several balances set opposite their respective names in the fourth column of the said schedule

Valuation of securities.

7. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreements, and in consideration of a composition of 10s. in the pound on the amounts or balances of their respective debts as aforesaid to the said creditors paid by the said A. B., on or before the execution of these presents (the receipt whereof the said creditors respectively hereby acknowledge), the said creditors respectively hereby release the said A. B. from their respective debts, the amounts whereof are specified in the second column of the schedule, and from all other debts (if any) owing from the said A. B. to the said creditors respectively, subject nevertheless to the provisos hereinafter contained

Receipt of composition.

Release.

8. PROVIDED ALWAYS that nothing herein contained shall prevent the said creditors, or any of them, from enforcing or otherwise obtaining the full benefit of any charge or lien they respectively now have upon any estate or effects (other than the estate or effects of the said A. B.), or from suing any person or persons other than the said A. B.; and Provided also that any creditor or creditors who may have any charge or lien upon any estate or effects of the said A. B. shall be entitled to enforce such charge or lien for the amount (and such amount only) at which the same has been valued as aforesaid.

Provisoes preserving securities.

IN WITNESS, &c.

[SCHEDULE.]

No. X.

## SCHEDULE.

Names of Creditors.	Amount of Debt.	Value set upon Security.	Balance of Debt.

No. XI.

No. XI.

## INSPECTORSHIP DEED. (a).

1. Parties.
2. Recital of business.
3. Recital of debts.
4. Recital of agreement for carrying on business under inspection.
5. 1st testatum.  
Covenant by creditors not to sue, and that deed may be pleaded as satisfaction.
6. 2nd testatum.  
Covenant by debtor to pay debts.
7. " " to give account of his estate.
8. " " to aid in carrying on or winding up business.
9. " " to pay moneys into bank.
10. " " not to engage in other trade.
11. " " not to encumber property or prefer creditors.
12. " " to keep accounts, etc.
13. " " to render periodical statement.
14. " " in certain events to make complete assignment of property.
15. 3rd testatum.  
Power to inspectors to employ clerks.
16. " to draw bills and obtain advances.
17. " for debtor to retain salaries and advances.
18. 4th testatum.  
Trusts of assignment (if any) made under par. 14.
19. " of moneys.
20. Debts to be debts provable in bankruptcy, *ante*, p. 208.
21. Provisoes for valuation or abandonment of securities, *ante*, p. 209.
22. Verification of debts, *ante*, p. 209.

(a) As to the liability of a deed for carrying on the debtor's business to be declared fraudulent under the Statute 13 Eliz. c. 5, see *Spenser v. Slater*, 4 Q. B.D. 13, considered *ante*, p. 112; and see also *Boldero v. London and Westminster Discount Company*, 5 Ex. D. 47, *ante*, p. 113. In the following precedent power is given to the creditors to discontinue the business, and the covenant to indemnify the inspectors is limited to a fixed sum.

23. Arbitration clause, *ante*, p. 209.
24. Power to extend period of operation of deed.
25. „ to creditors to direct speedier winding-up of business.
26. „ to any two inspectors to act.
27. „ to appoint new inspector.
28. Indemnity.
29. In certain events inspectors to give debtor certificate.
30. In certain events deed to operate as a release.

No. XI.

1. THIS INDENTURE, made, &c., BETWEEN A. B. of, &c. (*debtor*), of the first part; C. D. of, &c., E. F. of, &c., and G. H. of, &c. (*inspectors*), of the second part; and the several persons, companies, and firms, whose names and seals are hereunder signed and affixed respectively, being respectively creditors of the said A. B., and all other creditors of the said A. B., acceding hereto (hereinafter called "the creditors") of the third part
2. WHEREAS the said A. B. is engaged in carrying on the business of — at —
3. AND WHEREAS the said A. B. is indebted or liable to the said creditors in or for the several sums set opposite their respective names in the Schedule hereto
4. AND WHEREAS it is considered that with a view to the gradual realisation of the estate of the said A. B. it will be more advantageous to all parties interested, that the said A. B. shall for the period of — years [or such extended period (if any) as hereinafter mentioned] be permitted to carry on the said business under the supervision of the said C. D., E. F., and G. H., or other the persons acting as inspectors for the time being under these presents (hereinafter called "the inspectors") and for such purpose it has been agreed that the several parties shall enter into the respective covenants and agreements hereinafter contained
5. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreements, and in consideration of the premises and of the covenants on the part of the said A. B. hereinafter contained, the said creditors respectively hereby covenant with the said A. B. (but without prejudice to the enforcement of any mortgage, lien, or security to which they respectively may now be entitled, or to their right of action against any person other than the said A. B.), that they the said creditors respectively will not during the space of — years from the date hereof [or during such extended period (if any) as hereinafter mentioned] commence or prosecute any action against the said A. B., or attach or molest his goods or estate for or on account of any debt owing from the said A. B. to the said creditors respectively, in respect whereof they would be entitled to receive dividends under these presents, and that these presents shall and may be pleaded and allowed as an accord and satisfaction of such debt as aforesaid, and in bar or dis-

1. Parties.

2. Recital of business.

3. Of debts.

Of agreement for carrying on business under inspection.

1st testamentum. Covenant by creditors not to sue, and that deed may be pleaded as satisfaction.

- No. XL** charge of all and every action, proceedings, judgment, or execution which shall be brought, prosecuted, taken, or issued against the said A. B. by any of the said creditors contrary to the true intent and meaning of these presents
- 2nd testat-  
tum.** 6. AND THIS INDENTURE FURTHER WITNESSETH that, in further pursuance of the said agreement, and in consideration of the premises, the said A. B. doth hereby covenant with the said inspectors and each of them, that he will pay, or cause to be paid unto all and every of his said creditors their full respective debts and demands before the expiration of the said term of — years [or such extended period (if any) as hereinafter mentioned] according to the true intent and meaning of these presents
- Covenant  
by debtor  
to pay  
debts.** 7. And that he will, when requested by the said inspectors, or any of them, make out and deliver to each of them a full and accurate account in writing of all his estate and effects, and of the several charges, incumbrances, and outgoings, to which the same are subject respectively, and of all his debts and liabilities
- Covenant  
to give  
account of  
his estate** 8. And that he will to the best of his skill and ability forthwith carry on or proceed to wind up his said business according to the directions and under the superintendence of the said inspectors, and will during such time as the business is so carried on, use his best endeavours, subject to the provisions hereof, and in accordance with the directions that shall from time to time be given him in that behalf by the said inspectors, to obtain possession of, and realise, all the property and effects belonging to him, and will draw, accept, and indorse all such bills of exchange and other negotiable instruments as the said inspectors shall from time to time require for the purpose of carrying on the said business
- To aid in  
carrying  
on or  
winding up  
business.** 9. And that he will open an account at such bank as the inspectors shall from time to time direct in the joint names of the said inspectors or otherwise as the inspectors shall direct, and that (subject to the provisions contained in paragraph 17 hereof) when, and as often as the moneys, or securities for money received by him, shall amount to £—— and upwards, he will pay in and deposit the same to the credit of such account
- To pay  
moneys  
into bank.** 10. And that he will not, during the continuance of these presents, without the consent in writing of the said inspectors, be engaged or concerned in any other business or trade, either alone or jointly with any other persons, and will not without the like consent extend the scope of the said business now carried on by him, but that he will upon all matters requiring the exercise of discretion apply for the advice of the said inspectors, and in all respects attend to and act upon such directions or suggestions as the said inspectors shall give him in relation to the carrying on or winding up of the said business
- Not to  
engage in  
other  
trade, &c.** 11. And that he will not, during the continuance of these presents,

charge, incumber, alien, or release, any part of his estate or effects without the consent of the said inspectors, and will not do, or knowingly permit, any act whereby any of his creditors shall obtain any security for his debt, or any preference contrary to the true intent of these presents

Not to encumber property or prefer creditors.

12. And that he will during the continuance of these presents keep, or cause to be kept, all proper or customary books of account relating to his said trade and effects, and make or cause to be made all proper or usual entries or memoranda relating to his said trade and effects, and will permit the said inspectors at all times to inspect and examine all books, entries, documents, or memoranda relating to his said business and effects, and to copy them or make extracts therefrom

To keep accounts, &c.

13. And that he will on the first day of every month (or oftener if required by the said inspectors) make and deliver unto each of them a general report and statement in writing of the receipts and payments and all other matters and transactions relating to his said business and effects up to the end of the month then next preceding the time of such report

To render periodical statement.

14. And that if the said creditors shall not have received payment of their full respective debts during the said term of — years [or such extended period as aforesaid], in accordance with the covenant in that behalf contained in paragraph 6 hereof, or if at any time during the continuance of these presents the said inspectors shall be of opinion that it is inexpedient in the interests of the said creditors that the said business should continue to be carried on under these presents, or if a resolution for the discontinuance of the said business shall be passed by the said creditors under the provisions of paragraph 25 hereof, then in any such case he the said A. B. will thereupon, at the request of the said inspectors, convey, assign, and deliver up to the said inspectors, or as they shall direct, all such parts of his estate and effects as shall then remain undivided, or otherwise unapplied under these presents, to be applied in manner hereinafter appearing

In certain events to make complete assignment of property.

15. AND THIS INDENTURE FURTHER WITNESSETH, and it is agreed and declared as follows, that is to say, that it shall be lawful for the inspectors to employ, or authorize the said A. B. to employ, any persons as clerks, agents, or workmen, or in any other capacity, to assist in carrying on the business, at such reasonable salaries, wages, or remuneration as the inspectors shall think fit

Power to inspectors to employ clerks, &c.,

16. And that the said inspectors may, if they shall think fit, draw and accept bills, or other negotiable instruments, or require the said A. B. so to do, for the purpose of carrying on the business, and may obtain advances, not exceeding the sum of £—, in respect of the said business

to draw bills, &c., and obtain advances.

17. And that it shall be lawful for the said A. B., out of the sums

Power for

debtor to retain salaries and allowance.

4th testament.  
Trust of assignment (if any) made under par. 14.

Trusts of moneys.

Costs.

Preferential debts.

rateable distribution.

Power to extend period of operation of deed.

received by him, to pay all rents and taxes, and the salaries of clerks and others employed in the said business, and also, so long as he shall observe and perform the covenants on his part hereinbefore contained, to retain thereout a monthly allowance of £—, for the maintenance of himself and his family

18. AND THIS INDENTURE FURTHER WITNESSETH, and it is hereby AGREED and DECLARED, that in the event of the said A. B. being required to make, and making such assignment of his estate and effects as mentioned in paragraph 14 hereof, then the said inspectors shall stand possessed of the hereditaments and premises so conveyed and assigned to them UPON TRUST, at such time and in such manner as the creditors may resolve at such meeting (if any) as hereinafter mentioned, or, in default of such resolution, at the discretion of the inspectors, to call in, collect, and compel payment of, and receive such parts thereof as are outstanding, and to sell and convert into money such parts thereof as do not consist of money

19. AND that all the moneys which shall come to the hands or under the control of the inspectors, under or by virtue of these presents, shall (after payment of the costs of obtaining them) be applied by or under the direction of the inspectors, in the first place in payment of the costs and expenses of or incidental to the negotiation, preparation, and execution of these presents And in the next place in discharge of the costs of carrying the provisions hereof into effect (including the payment of such salaries and such allowance to the said A. B. as aforesaid, and of all debts incurred in reference to the carrying on or winding up of the business) And in the third place in discharge of all debts which are by law entitled to be paid in full in priority to other debts in case of bankruptcy And in the fourth place to pay, divide, and distribute the residue of the said moneys rateably among all the said creditors of the said A. B. in discharge of their debts in full, by such instalments and at such times as the said inspectors shall think fit, and to pay the surplus (if any) to the said A. B.

20. AND that the said creditors shall be entitled (*debts to be debts provable in bankruptcy, ut ante, p. 208, clause 21*).

21. PROVIDED ALWAYS, that any creditor, &c. (*Provisoes for valuation or abandonment of securities, ut ante, p. 209, clause 24*).

22. AND that all creditors, &c. (*verification of debts, ut ante, p. 209, clause 26*).

23. AND that in case (*arbitration clause, ut ante, p. 209, clause 27*).

[24. AND it is hereby FURTHER AGREED and DECLARED that it shall be lawful for the inspectors at their discretion, and without any further consent of the said creditors, notwithstanding the provisions contained in paragraph 25 hereof, from time to time, by writing under their hand and indorsed on these presents, to extend the



said term of — years hereinbefore provided for such further period or periods not exceeding in all the space of — months computed from the expiration of such term, and the creditors shall thereupon during such extended period be as fully restrained from suing as if such extended period had been part of the term originally provided herein]

No. XI.

25. AND that the said inspectors may whenever they think fit, and shall upon a requisition made in writing by any (*five*) creditors whose debts shall amount together to £—, call a meeting of the said creditors at or near the town of — for the purpose of considering the desirability of more speedily winding up the said business. And such meeting shall be held within — days of the receipt of such requisition, and not less than 14 days' notice of the holding thereof shall be given to the said creditors by prepaid letter addressed to their respective last known places of residence or business. And whenever the majority in number (representing in value more than a moiety of the debts ranking for dividend hereunder) of the creditors present at any such meeting as aforesaid shall resolve that the said business shall be discontinued, then the provisions of paragraphs 14 and 18 hereof shall come into operation.

Power of creditors at meeting to resolve on speedier winding up of business.

26. AND it is hereby AGREED AND DECLARED that any discretion, act, or thing hereinbefore authorised to be exercised or done by the inspectors may be exercised or done by any two of them.

Power to any two inspectors to act.

27. And if any of the said inspectors or any inspector to be appointed as hereinafter mentioned shall die, or go to reside abroad, or refuse, or become incapable or unfit to act, then and in every such case it shall be lawful for a majority in number of the creditors, representing in value more than a moiety of the debts ranking for dividend hereunder, by writing under their respective hands [and seals] to appoint a new inspector to act in the place of the inspector so dying, or going to reside abroad, or refusing, or becoming incapable or unfit to act, and any inspector so appointed shall have the same powers, authorities, rights, and discretions as if he had been originally appointed an inspector by these presents.

Power to appoint new inspector.

28. AND it is hereby FURTHER AGREED and DECLARED that the said inspectors shall be indemnified out of the said premises hereby assigned in respect of all transactions, personal engagements, matters, and things which they or any of them shall lawfully do or cause to be done, or enter into, order, or direct concerning the business affairs, estate, or effects of the said A. B. in pursuance of these presents. And the said creditors respectively hereby covenant with the said inspectors respectively that they will on demand pay to the said inspectors all costs, charges, and expenses (not exceeding £— in all) incurred by them respectively in respect of any such transactions, engagements, matters, and things as aforesaid, but so that each creditor shall be liable only

Indemnity.

No. XI. for a share of such costs, charges, and expenses bearing the same proportion to the total amount thereof (not exceeding the said sum of £—) as the debt of such creditor bears to the total amount of the debts ranking for dividend hereunder

In certain events inspectors to give debtor certificate.

29. AND it is hereby FURTHER AGREED and DECLARED that upon the execution of such conveyance and assignment, and on the completion of such delivery as mentioned in paragraph 14 hereof, or if and when the said A. B. or the said inspectors shall otherwise in pursuance of these presents have realised and disposed of the estate and effects of the said A. B. for the benefit of the said creditors, then in either such case the said inspectors shall give to the said A. B. a certificate certifying such execution and completion or such realisation and disposal as aforesaid

In certain events deed to operate as release,

30. AND that if and when the said creditors respectively shall have received payment of their respective debts in pursuance of the covenant contained in paragraph 6 hereof or if and when the said A. B. shall have received such certificate as mentioned in paragraph 29 hereof, then in either such case these presents shall operate as a release, and the said A. B. shall thereafter stand and be released from the debts mentioned in the schedule and from all other debts (if any) now owing from him to the said creditors respectively in respect whereof they would be entitled to receive dividends under these presents, but without prejudice, nevertheless, to the enforcement of any mortgage, lien, or security to which the said creditors may now be entitled respectively (subject, nevertheless, to the provisions of paragraph 21 hereof) or to any right of action which they may have against any person or persons other than the said A. B.

but without prejudice to securities.

IN WITNESS, &c.

#### SCHEDULE.

No. XII.

No. XII.

ASSIGNMENT (a) by a TRADER of his ESTATE and effects to trustees—  
TRUST to CARRY ON BUSINESS, or REALISE and distribute proceeds rateably among creditors—debtor to assist in realisation, &c.—  
Creditors RELEASE their debts.

Parties.

THIS INDENTURE, made, &c., BETWEEN A. B. of, &c. (debtor), of the first part; C. D. of, &c., E. F. of, &c., G. H. of, &c. (trustees), of the second part; and the several persons, companies, and firms, whose

(a) See note to preceding form, *supra*, p. 230, n. (a). The following precedent is drawn as closely as possible on the lines of the deed in *Boldero v. London and Westminster Discount Company*, 5 Ex. D. 47.

names and seals are hereunder signed and affixed respectively, being No. XII.  
creditors of the said A. B., (and all other creditors of the said A. B.,  
acceding hereto) (hereinafter called "the creditors") of the third part

2. WHEREAS the said A. B. is engaged in carrying on the business of Business.  
— at —

3. AND WHEREAS the said A. B. is indebted or liable to the said Debts.  
creditors in or for the several sums set opposite their respective names  
in the Schedule hereunder written

4. AND WHEREAS it is considered expedient, and to the interests of all Agreement  
parties concerned, with a view either to the said business being disposed to execute  
of as a going concern, or otherwise realised to the best advantage, deed.  
that the estate and effects of the said A. B. should be assured in  
manner hereinafter appearing, and it has been agreed that the several  
parties hereto shall enter into the respective covenants and agreements  
hereinafter contained

5. NOW THIS INDENTURE WITNESSETH that in consideration of the Assign-  
premises, and of the release hereinafter contained, the said A. B. hereby ment of  
conveys unto the said C. D., E. F., and G. H., their heirs, executors, estate and  
and administrators, All and singular the real and personal estate and effects.  
effects of the said A. B. to which he is beneficially entitled, whether in  
possession, reversion, remainder, or expectancy To HOLD the same to Habendum.  
the said C. D., E. F., and G. H., their heirs, executors, and adminis-  
trators according to the nature and quality thereof but subject to the  
charges or incumbrances now affecting the same respectively, Upon  
the trusts, and subject to the provisos and agreements hereinafter  
declared concerning the same

6. AND it is hereby AGREED and DECLARED that the said C. D., Trusts.  
E. F., and G. H., or other the trustees or trustee of these presents  
(hereinafter called "the trustees or trustee"), shall stand possessed of  
the hereditaments and premises hereinbefore conveyed UPON TRUST at  
such time and in such manner as they or he shall think fit [*Continue ut  
ante*, p. 213, clause 9.]

7, 8. UPON TRUST (*Trusts for payment of costs and preferential  
claims, ut ante*, p. 207, clauses 13 and 14).

9. And to divide the balance of such moneys rateably among the Rateable  
creditors, parties hereto [including as such creditors, if the trustees or distribution.  
trustee shall think fit, but not otherwise, such persons being creditors  
of the said A. B. as may have refused or neglected to execute these  
presents, and to pay the dividends on the debts due to such last-men-  
tioned creditors who are not parties hereto to the debtor if the trustees  
or trustee think proper, but not otherwise]

10. PROVIDED ALWAYS, and it is hereby AGREED AND DECLARED Power to  
(*Power to delay sale and collection, ut ante*, p. 217, clause 13)

11. AND it shall be lawful for the trustees or trustee to carry on the  
collection.

Power to  
carry on  
business.

said business, and for such last-mentioned purpose to make such advances out of the premises for the time being subject to the trusts of these presents as they or he shall think fit

12. AND (*debts to be debts provable in bankruptcy, ante, p. 208, clause 21*)

13. AND THIS INDENTURE FURTHER WITNESSETH that in pursuance of the said agreement, and in consideration of the premises, the said A. B. hereby covenants with the said trustees respectively that he will when requested (*give account of his estate, ut sup., p. 232, clause 7, substituting "trustees" for "inspectors"*)

Covenant  
to assist  
trustee.

14. AND that he will to the best of his ability assist the trustees in carrying on the said business as aforesaid, and in winding up the same, and in obtaining possession of and realising all the property and effects hereby conveyed, in accordance with the directions that shall from time to time be given him in that behalf by the said trustees, and will execute and do all such assurances and things as may be necessary for effectuating these purposes

Powers to  
trustees.

15. AND THIS INDENTURE FURTHER WITNESSETH, and it is hereby AGREED and DECLARED, that it shall be lawful to the said trustees or trustee, at their or his discretion to make such allowance to the said A. B. for his maintenance or otherwise, and to return to the said A. B. the whole or such part of his household furniture and effects as they or he shall think fit

16. AND it shall be lawful for the said trustees or trustee at their or his discretion to employ any person or persons in carrying the trusts of these presents into effect, including the carrying on the said business, and out of the said trust moneys to pay such person or persons so employed as aforesaid such sum or sums of money as the trustees or trustee shall think fit

Release.

17. AND THIS INDENTURE FURTHER WITNESSETH that in consideration of the premises the said creditors respectively hereby release the said A. B. from the debts specified in the Schedule hereto, and from all other debts (if any) owing from the said A. B. to the said creditors respectively in respect whereof they would be entitled to receive dividends under these presents

18. PROVIDED ALWAYS (*proviso that release shall not prejudice securities, &c., ut ante, p. 208, clause 23*)

19. (*Provisoes for valuation or abandonment of securities, p. 209, clause 24*)

20. AND it is hereby FURTHER AGREED and DECLARED (*indemnity, ante, p. 235, clause 28, substituting "trustees" for "inspectors"*)

IN WITNESS, &c.

SCHEDULE.

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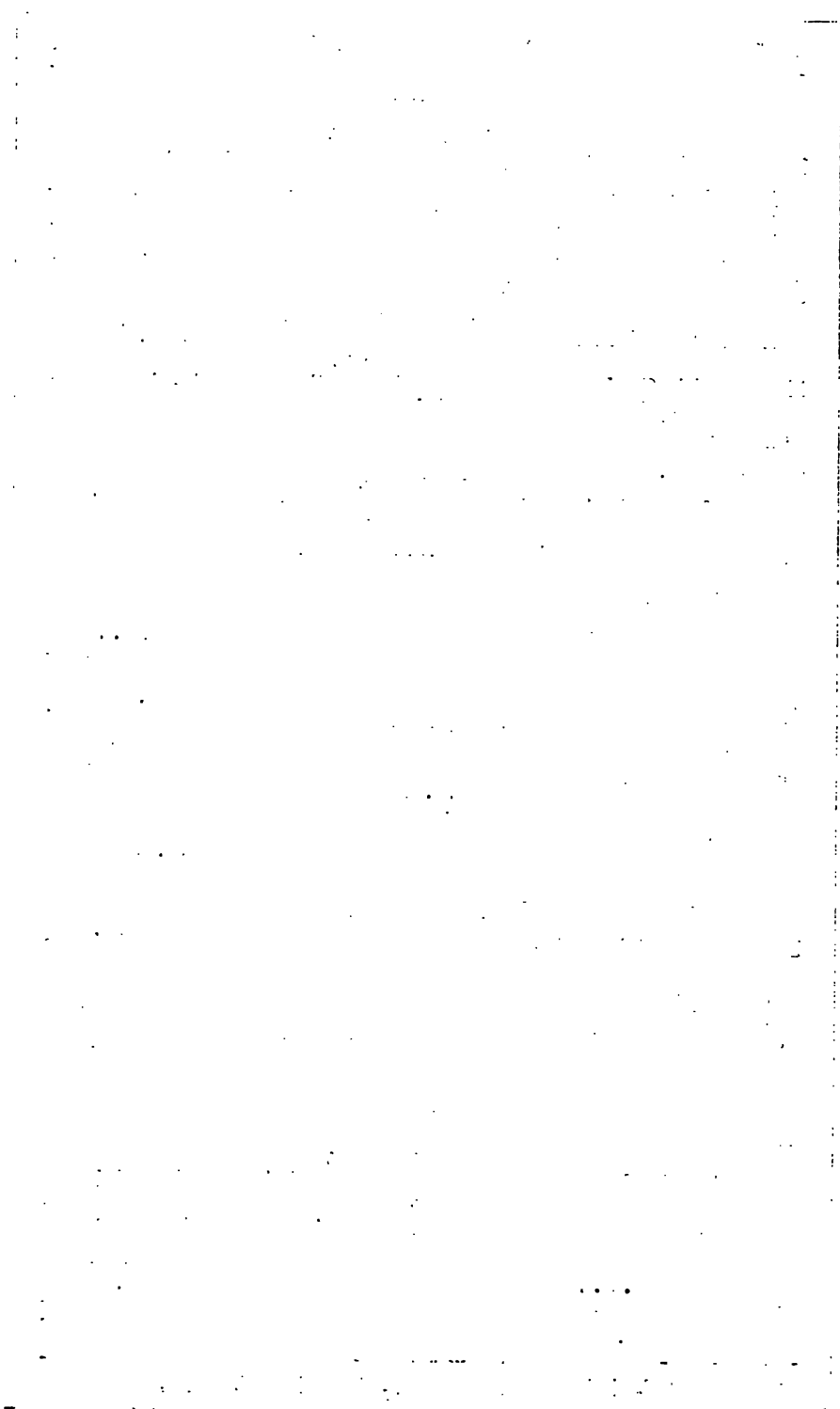
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